A

That Wei v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05(M)-347–07 OF 2018
YAACOB MD SAM, RAVINTHRAN AND NANTHA BALAN JJCA
3 AUGUST 2021

C *Criminal Procedure — Appeal — Appeal against conviction — Murder — Whether prima facie case established — Whether trial judge erred in concluding that accused's DNA was found on murder weapon — Whether trial judge erred in assuming existence and involvement of a third party was 'afterthought' — Whether misdirection of trial judge vitiated decision* D *— Whether there was a miscarriage of justice — Whether conviction safe*

This was an appeal by the appellant who was convicted under s 302 of the Penal Code for the murder of a female person ('deceased'). The place where the offence took place was a three-storey shop lot which was used as a 'hostel' to E provide accommodation for foreign workers. The deceased stayed in room 3 on the hostel while the appellant stayed in room 5. The occupant of room 8 was, Aung Soe Oo ('SP6'). In the High Court, SP6 had testified that on the eventful day, SP6 had saw the appellant coming out of the deceased's room holding a blood-stained knife. SP6 also noticed bloodstains on the appellant's striped F T-shirt as the appellant ran down the stairs. As the door to room 3 was open, SP6 peeped into room 3 and saw the motionless body of the deceased lying on the floor, drenched in blood. Subsequently, the investigating officer ('SP11') and the police forensic) team ('CSI team') lead by ASP Mohd Nawawi bin Yaakob ('SP9') arrived at the scene of the crime. The CSI team, amongst others, G recovered two knives. One knife had an orange handle and was found in room 3 (where the deceased was found) (exh 'P30A'). There were no visible blood stains on exh P30A. The police also recovered another knife. It had a black handle with a six-inch blade (exh 'P31A'). Exhibit P31A was found near the staircase. There were no visible blood stains on exh P30A but there were H blood stains on exh P31A. The appellant was then apprehended while attempting to leave the country via the border in the state of Kelantan. After his apprehension, the appellant led the police to a rubbish dump site where a pair of Lee's jeans with a belt were recovered (exh 'P41A') and (exh 'P42A'). The forensic pathologist who performed the post-mortem ('SP5') concluded, inter I alia, that the injuries could have been caused by a sharp object, such as knife and there was a slim to no chance of survival for the deceased. However, the scientific officer from the forensic division of the Chemistry Department ('SP13') amongst others, testified unequivocally that the appellant's DNA was not found on either of the two knifes (exhs P30A and P31A). SP13 however

said that exh P30A had a minor contributor by an unknown male person, but the appellant was not a contributor to the DNA found on exh P30A. SP13 also testified that there were blood stains on the Lee's jeans ('exh P41A'). The blood stains on the jeans had yielded the deceased's DNA as well as the appellant's DNA. The appellant, in defence, denied that he had murdered the deceased and contended that the person responsible for the murder of the deceased was one Mya Hlaing. The appellant further submitted that when he saw the deceased body, he was scared and decided to return to Myanmar. The High Court judge ('HCJ'), taking into account the totality of circumstantial evidence, found the appellant guilty of the offence as charged and sentenced the appellant to death by hanging. Hence the present appeal. The main complaint advanced by the appellant was that: (a) at the end of the prosecution's case, the HCJ took into account non-existent evidence and made an erroneous evaluation under s 180 of the Criminal Procedure Code. According to the appellant, at the end of the prosecution's case, the HCJ had concluded that the appellant's DNA was found on exh P31A; and (b) after the defence was called, the HCJ had wrongly assumed that the existence and involvement of Mya Hlaing was, amongst others, an 'afterthought' and rejected the Mya Hlaing theory. The appellant, therefore, contended that he was not given a fair trial, there was a miscarriage of justice, and he was therefore entitled to an acquittal. The issues that arose for determination, inter alia, were: (i) whether the HCJ's error vitiated his decision that a prima facie case for an offence under s 302 of the Penal Code had been established; (ii) whether the perpetuation of the same error when the HCJ came to consider the case at the end of the defence stage, similarly vitiated the HCJ's decision that the prosecution had proven beyond reasonable doubt that the appellant had committed the offence of murder under s 302 of the Penal Code; and (iii) whether in light of the misdirection, the conviction was safe.

Held, dismissing the appeal:

(1) Ultimately, the court was impelled to the conclusion that the appellant had not raised any reasonable doubt in relation to his culpability in the murder of the deceased on 16 February 2016. The circumstantial evidence when taken together with all the evidence adduced by the prosecution and defence led to the irresistible conclusion that the appellant had inflicted the fatal injuries on the deceased. It was also clear from the nature of the injuries, particularly the incision wound to the neck that the appellant must have intended to inflict such bodily injury on the deceased which was sufficient in the ordinary course of nature to cause death. Thus, the appellant's act fell squarely within limb (c) of s 300 of the Penal Code (see paras 86–87).

(2) Even after having disregarded the erroneous evidence as to the appellants' DNA being found on exh P31A and accepting the fact the (alleged) involvement of Mya Hlaing was brought up especially during the

cross-examination of SP6 and P11, the remaining strands of evidence had sufficient strength of probity to form a case against the appellant that was strong enough to meet the stringent requirements of the law to convict a person based on circumstantial evidence (see para 88).

(3) There was no evidence that the appellant had informed the police about the existence of or the involvement of Mya Hlaing. Indeed, if such a person did exist, then at the very least, there should be some paper trail to show that he did work in the vicinity of the restaurant. Further, there appeared to be no effort made to elicit facts to at least show that Mya Hlaing existed, and that he was involved in the murder of the deceased. As correctly concluded by the HCJ, the appellant was lawfully working in Malaysia. He had no reason to be afraid of the authorities. His conduct was not consistent with that of a person who was innocent. Although running away from the scene of the crime per se was not evidence of guilt, such conduct did call for an explanation (see paras 90–91).

(4) The injuries to the deceased, the blood stains on exh P31A (containing the deceased's DNA), SP6's evidence as to the fact that he had seen the appellant emerging from the deceased's room whilst holding a knife with a black handle (exh P31A) and with blood stains on his striped T-shirt and the appellant's entire conduct in running away and attempting to leave the country, without even calling his employer, SP3 and the retrieval of exh P41A, pointed irresistibly to the singular conclusion that the appellant had committed the murder. The appellant could not explain why he did not even call his employer, SP3 to tell him what had happened. Also, there was no evidence that the appellant had mentioned anything about Mya Hlaing to the police. Thus, although the HCJ erred in concluding that Mya Hlaing was only brought up during the defence stage (ie an afterthought), upon an examination of the evidence in its entirety, it was clear that the Mya Hlaing theory was one which was not communicated to the police, at the earliest possible opportunity and, devoid of any credibility. The HCJ's misdirection was not fatal as ultimately, there was no miscarriage of justice since there was cogent, convincing and compelling circumstantial evidence to convict the appellant (see paras 92–93).

(5) The appellant had failed to raise a reasonable doubt as to his culpability in the offence with which he was charged, to wit, the murder of the deceased. The circumstantial evidence tendered by the prosecution irresistibly proved beyond reasonable doubt that it was the appellant who murdered the deceased as per the charge, and that the evidence did not point to any other explanation which may exculpate the appellant. Consequently, the conviction for the offence of murder under s 302 of the Penal Code was safe and there was no reason to disturb the HCJ's findings of fact (see paras 94–96).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu yang telah disabitkan di bawah s 302 Kanun Keseksaan kerana membunuh seorang wanita ('si mati'). Tempat di mana berlakunya kesalahan tersebut adalah di lot kedai tiga tingkat yang dijadikan 'asrama' bagi menyediakan tempat tinggal bagi pekerja asing. Si mati tinggal di dalam bilik 3 asrama tersebut sementara perayu tinggal di dalam bilik 5. Penghuni bilik 8 adalah, Aung Soe Oo ('SP6'). Di Mahkamah Tinggi, SP6 telah memberi keterangan bahawa pada hari kejadian, SP6 telah melihat perayu keluar dari bilik si mati dengan memegang pisau berlumuran darah. SP6 juga melihat kesan darah pada kemeja-T berbelang perayu apabila perayu berlari menuruni tangga. Oleh kerana pintu bilik 3 terbuka, SP6 menjenguk ke dalam bilik 3 dan melihat mayat terkulai si mati terbaring di lantai, berlumuran darah. Selepas itu, pasukan penyiasat ('SP11') dan pasukan forensik polis ('pasukan CSI') yang diketuai oleh ASP Mohd Nawawi bin Yaakob ('SP9') tiba di tempat kejadian. Pasukan CSI, antara lain, menemui dua bilah pisau. Sebilah pisau mempunyai pemegang berwarna oren dan dijumpai di dalam bilik 3 (tempat si mati ditemui) (eksh 'P30A'). Tidak ada kesan darah yang dilihat pada eksh P30A. Polis juga menemui sebilah pisau lain. Ia mempunyai pemegang berwarna hitam berserta enam inci bilah (eksh 'P31A'). Ekshibit P31A ditemui berhampiran tangga. Tidak ada kesan darah yang dilihat pada eksh P30A tetapi terdapat kesan darah pada eksh P31A. Perayu kemudian ditahan apabila cuba meninggalkan negara ini melalui sempadan di negeri Kelantan. Setelah ditahan, perayu membawa polis ke tempat pembuangan sampah di mana sepasang seluar jeans berjenama Lee dengan tali pinggang ditemui (eksh 'P41A') dan (eksh 'P42A'). Pakar patologi forensik yang melakukan bedah siasat ('SP5') menyimpulkan, antara lain, bahawa kecederaan tersebut mungkin disebabkan oleh benda tajam, seperti pisau dan peluang untuk si mati hidup sangat tipis. Walau bagaimanapun, pegawai saintifik dari bahagian forensik Jabatan Kimia ('SP13') antara lain, memberi keterangan dengan tegas bahawa DNA perayu tidak dijumpai pada kedua-dua bilah pisau tersebut (ekshs P30A dan P31A). SP13 bagaimanapun mengatakan bahawa eksh P30A mempunyai penyumbang minor seorang lelaki yang tidak dikenali, tetapi perayu bukanlah penyumbang DNA yang terdapat pada eksh P30A. SP13 juga memberi keterangan bahawa terdapat kesan darah pada seluar jeans berjenama Lee ('eksh P41A'). Kesan darah pada seluar jeans mempunyai DNA si mati dan juga DNA perayu. Perayu, dalam pembelaannya, menafikan bahawa beliau telah membunuh si mati dan berpendapat bahawa orang yang bertanggungjawab terhadap pembunuhan si mati adalah Mya Hlaing. Perayu selanjutnya menghujahkan bahawa apabila beliau melihat mayat si mati, beliau berasa takut dan memutuskan untuk kembali ke Myanmar. Hakim Mahkamah Tinggi ('HMT'), dengan mempertimbangkan keseluruhan keterangan mengikut keadaan, mendapati perayu bersalah terhadap kesalahan sepertimana pertuduhan dan menjatuhkan perayu hukuman gantung sampai mati. Dengan itu, rayuan semasa. Aduan

utama yang dikemukakan oleh perayu adalah bahawa: (a) pada akhir kes pendakwaan, HMT mengambil kira keterangan yang tidak wujud dan membuat kekhilafan penilaian berdasarkan s 180 Kanun Tatacara Jenayah. Menurut perayu, di akhir kes pendakwaan, HMT telah menyimpulkan bahawa DNA perayu telah dijumpai pada eksh P31A; dan (b) setelah pembelaan dipanggil, HCJ telah dengan salah dalam anggapan bahawa kewujudan dan penglibatan Mya Hlaing, antara lain, adalah 'pemikiran semula' dan menolak teori Mya Hlaing. Oleh itu, perayu berpendapat bahawa beliau tidak diberi perbicaraan yang adil, terdapat ketidakadilan, dan oleh itu beliau berhak dibebaskan. Isu-isu yang timbul untuk ditentukan, antara lain, adalah: (i) sama ada kekhilafan HCJ mencacatkan keputusannya bahawa kes prima facie atas kesalahan di bawah s 302 Kanun Keseksaan telah dibuktikan; (ii) sama ada berlakunya kekhilafan yang sama apabila HMT mempertimbangkan kes tersebut di akhir peringkat pembelaan, dengan itu mencacatkan keputusan HMT bahawa pihak pendakwaan telah membuktikan tanpa keraguan yang munasabah bahawa perayu telah melakukan kesalahan membunuh di bawah s 302 Kanun Keseksaan; dan (iii) sama ada apabila terjadinya salah arah, sabitan tersebut dikekalkan.

Diputuskan, menolak rayuan:

(1) Pada akhirnya, mahkamah harus membuat kesimpulan bahawa perayu tidak menimbulkan keraguan yang munasabah berkaitan dengan kesalahannya terhadap pembunuhan si mati pada 16 Februari 2016. Keterangan mengikut keadaan apabila diambilkira secara bersama dengan kesemua keterangan yang dikemukakan oleh pihak pendakwaan dan pembelaan membawa kepada kesimpulan yang tidak dapat ditolak bahawa perayu telah menyebabkan kecederaan maut pada si mati. Ia juga jelas dari sifat kecederaan tersebut, terutamanya luka tikaman pada leher bahawa perayu mempunyai niat untuk menyebabkan kecederaan tubuh badan pada si mati yang mencukupi dalam keadaan sifat biasa bagi menyebabkan kematian. Oleh itu, tindakan perayu termasuk dalam bahagian (c) s 300 Kanun Keseksaan (lihat perenggan 86–87).

(2) Walaupun setelah mengabaikan kekhilafan keterangan berkenaan DNA perayu yang dijumpai pada eksh P31A dan menerima fakta bahawa (dakwaan) penglibatan Mya Hlaing dibangkitkan terutamanya semasa pemeriksaan balas SP6 dan P11, baki sisa keterangan mempunyai kekuatan yang dipercayai untuk membentuk kes terhadap perayu yang cukup kuat untuk memenuhi syarat ketat keperluan undang-undang untuk mensabitkan seseorang berdasarkan keterangan mengikut keadaan (lihat perenggan 88).

(3) Tidak ada keterangan bahawa perayu telah memaklumkan kepada polis tentang kewujudan atau penglibatan Mya Hlaing. Sesungguhnya, sekiranya seorang seperti itu wujud, maka paling tidak, mesti terdapat

jejak kertas untuk menunjukkan bahawa beliau memang bekerja di sekitar restoran tersebut. Selanjutnya, nampaknya tidak ada usaha yang dilakukan untuk mendapatkan fakta untuk setidaknya menunjukkan bahawa Mya Hlaing wujud, dan bahawa beliau terlibat dalam pembunuhan si mati. Seperti yang disimpulkan dengan tepat oleh HMT, perayu bekerja secara sah di Malaysia. Beliau tidak mempunyai alasan untuk takut kepada pihak berkuasa. Tingkah lakunya tidak selari dengan perbuatan orang yang tidak bersalah. Walaupun melarikan diri dari lokasi jenayah itu sendiri bukanlah keterangan rasa bersalah, tingkah laku tersebut memerlukan penjelasan (lihat perenggan 90–91).

(4) Kecederaan pada si mati, kesan darah pada eksh P31A (yang mengandungi DNA si mati), keterangan oleh SP6 mengenai fakta bahawa beliau telah melihat perayu keluar dari bilik si mati sambil memegang pisau dengan pemegang hitam (exh P31A) dan dengan kesan darah pada kemeja T berbelangnya dan keseluruhan tingkah laku perayu dalam melarikan diri dan berusaha meninggalkan negara, tanpa memanggil majikannya, SP3 dan eksh P41A yang dijumpai semula, menunjukkan kesimpulan dengan nyata pada satu-satunya kesimpulan bahawa perayu melakukan pembunuhan tersebut. Perayu tidak dapat menjelaskan mengapa beliau tidak memanggil majikannya, SP3 untuk memaklumkannya apa yang telah terjadi. Juga, tidak ada keterangan bahawa perayu telah mengatakan apa-apa mengenai Mya Hlaing kepada polis. Oleh itu, walaupun HMT telah terkhilaf dalam menyimpulkan bahawa Mya Hlaing hanya dibangkitkan semasa peringkat pembelaan (iaitu pemikiran semula), setelah memeriksa keterangan secara keseluruhan, ianya jelas bahawa teori Mya Hlaing adalah yang tidak disampaikan kepada polis, secepat mungkin dan bebas dari sebarang kredibiliti. Salah arah oleh HMT tidak memudaratkan secara muktamadnya, tidak ada ketidakadilan kerana terdapat keterangan yang jelas, meyakinkan dan menarik untuk mensabitkan perayu (lihat perenggan 92–93).

(5) Perayu telah gagal menimbulkan keraguan yang munasabah mengenai kesalahannya terhadap jenayah yang dituduh ke atasnya, iaitu, pembunuhan si mati. Keterangan mengikut keadaan yang dikemukakan oleh pihak pendakwaan dengan nyata terbukti melangkaui keraguan munasabah bahawa perayulah yang membunuh si mati sepertimana pertuduhan, dan keterangan tidak menunjukkan penjelasan lain yang dapat melepaskan perayu. Justeru itu, sabitan atas kesalahan membunuh di bawah s 302 Kanun Keseksaan dikekalkan dan tidak ada alasan untuk mengganggu dapatan fakta HMT (lihat perenggan 94–96).]

Cases referred to

Ahmad Najib bin Aris v PP [2009] 2 MLJ 613; [2009] 2 CLJ 800, FC (refd)
Chan Chwen Kong v PP [1962] 1 LNS 22; [1962] MLJ 307, CA (refd)

A *Koong Swee Kwan v PP* [2020] MLJU 648; [2020] 7 CLJ 67; [2020] AMEJ 0516, CA (folld)
Kuldip Sharma v The State [1996] Cri LJ 244, HC (refd)
Lim Hean Cheong v PP [2012] 1 MLJ 149; [2012] 2 CLJ 1046; [2011] 1 LNS 1078; [2012] 1 AMR 160, CA (refd)
B *Parlan Dadeh v PP* [2008] 6 MLJ 19; [2008] 1 LNS 506; [2009] 1 CLJ 717, FC (refd)
Pathmanabhan Nalliannen v PP & other appeals [2017] 3 MLJ 141; [2017] 4 CLJ 137; [2017] 3 AMR 105; [2017] AMEJ 371, FC (refd)
PP v Saimin & Ors [1971] 2 MLJ 16; [1971] 1 LNS 115, HC (refd)
C *R v Taylor, Weaver and Donovan* (1928) 21 Cr App R 20 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60
D Criminal Procedure Code ss 113, 180, 422
Evidence Act 1950 ss 8, 9
Penal Code ss 300, 300(c), 302

Appeal from: Criminal Trial No 45B-36–12 of 2016 (High Court, Shah
E Alam)

Ridha Abdah Subri (Ridha & Rai) for the appellant.
Mohd Khushairy bin Ibrahim (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

F

Nantha Balan JCA (delivering judgment of the court):

INTRODUCTION

G **[1]** The appellant, a Myanmar national (Myanmar Passport No M 363092), was charged under s 302 of the Penal Code for the murder of a female person named Cing Huai Vung. She was a worker in a restaurant and was known to her co-workers as 'Chen'. For convenience, we shall refer to Cing Huai Vung as 'the deceased'. A total of 14 witnesses testified for the prosecution. At the end of the
H prosecution's case, the learned judge ('the judge') called for the defence. The appellant elected to testify by giving sworn testimony. He was the sole witness for the defence. On 5 July 2018, the appellant was convicted for the offence of murder under s 302 of the Penal Code and was sentenced to death accordingly. He appealed to the Court of Appeal against the conviction for the offence of
I murder. The appeal came up for hearing before us on 3 August 2021. We dismissed the appeal and confirmed the appellant's conviction and the mandatory death sentence for the offence of murder under s 302 of the Penal Code. These are our reasons for dismissing the appeal.

THE CHARGE

[2] The amended charge ('the charge') against the appellant read as follows:

> Bahawa kamu pada 16/02/2016, jam lebih kurang 10.00 pagi, bertempat di alamat No. 18-1, Jalan BPU 1, Bandar Puchong Utama, dalam daerah Petaling, di dalam negeri Selangor Darul Ehsan telah melakukan bunuh dengan menyebabkan kematian terhadap Cing Huai Vung (No. Pengenalan Diri: ZAM-27332) dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

THE PROSECUTION'S CASE

[3] It is necessary to state at the outset, that the prosecution's case was based on circumstantial evidence. There was no direct evidence to implicate the appellant with the murder of the deceased who was 31 years old when she died. There were no eyewitnesses who saw the deceased committing the offence. But there was direct eyewitness evidence which placed the appellant at the scene of the crime at about the time when the deceased's body was discovered. All the other evidence which was relied upon by the prosecution were strands which constituted circumstantial evidence.

[4] The law does not insist that there must be direct evidence such as the evidence of an eyewitness. Thus, the absence of an eyewitness is not of itself indicative of whether the accused was complicit in the crime for which he had been charged. In the absence of direct evidence, the prosecution has to rely on circumstantial evidence. In some situations, circumstantial evidence is the only available evidence. However, the circumstantial evidence must of such a nature and quality that it is compelling and convincing to amount to proof beyond reasonable doubt. In that sense, circumstantial evidence may be as good as direct evidence. In this regard, it is appropriate to refer to the words of Lord Hewart CJ in the case of *R v Taylor, Weaver and Donovan* (1928) 21 Cr App R 20, CCA at p 21 where he said:

> It has been said that the evidence against applicant is circumstantial: so it is, but circumstantial evidence *is very often the best. It is evidence of surrounding circumstances which, by undesigned coincidence is capable of proving a proposition with the accuracy of Mathematics.* It is no derogation from evidence to say that it is circumstantial. (Emphasis added.)

[5] The challenge for the prosecution in mounting a case which is predicated on circumstantial evidence is that they bear a heavy burden in their endeavour to secure a conviction. In *Lim Hean Cheong v Public Prosecutor* [2012] 1 MLJ 149; [2012] 2 CLJ 1046; [2011] 1 LNS 1078; [2012] 1 AMR 160 (CA) the Court of Appeal described the prosecution's burden in the following words:

A [53] In this case the prosecution relied purely on circumstantial evidence to prove its case against the appellant. *The onus on the prosecution, where the evidence relied on is circumstantial, is a very heavy one and that the evidence must point irresistibly to the conclusion of the guilt of the accused. If there are gaps in it, then it is not sufficient* (*Chang Kim Siong v Public Prosecutor* [1968] 1 MLJ 36).

B Where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also *the combined strength of these strands when twisted together to make a rope*. The real question is: is that rope strong enough to hang the prisoner? (*Chan Chwen Kong v Public Prosecutor* [1962] MLJ 307).

C [54] In *Chandmal & Anor v State of Rajasthan* AIR 1970 SC 917, the Supreme Court of India in dealing with circumstantial evidence had this to say:

> It is well settled that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests. *Firstly*, the *circumstances* from which an
D inference of guilt is sought to be drawn, *must be cogently and firmly established*. *Secondly*, those *circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused*. *Thirdly*, the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no
E one else. That is to say *the circumstances should be incapable of explanation on any reasonable hypothesis save that of the accused's guilt*. (Emphasis added.)

[6] We turn now to the charge. According to the charge, the appellant had committed the offence on 16 February 2016, at around 10am at No 18-1, Jalan
F BPU 1, Bandar Puchong Utama, District of Petaling. The place where the offence took place was a three-storey shop-lot which was used as a 'hostel' to provide accommodation for foreign workers. The occupants of the rooms were all workers in Restaurant 83 ('the restaurant') which was owned by Yap Tiam Oon ('SP3'). The person in charge of the cash counter in the restaurant was Yap
G Tian Seng ('SP4'). For convenience, we shall refer to the address mentioned in the charge as 'the hostel'.

[7] The deceased and her husband, Kap Khat Lian ('Khat'), who was also a
H Myanmar citizen, stayed in one of the rooms on the second floor of the hostel. Khat worked as a cook in the restaurant which was located about 100 meters away from the hostel. There was a total of eight partitioned rooms on the second floor of the hostel. The position of the eight rooms is as stated in the sketch plan which is at p 21 *Rekod Rayuan Jld* 3(2).

I **[8]** Essentially, there were two rows of rooms. The row at the top of the sketch plan consisted of six rooms. They were numbered as rooms 1 to 6. Then there was a row consisting of two rooms located opposite the six rooms. These were numbered as rooms 7 and 8.

[9] The deceased and her husband, Khat occupied room 3. A co-worker in the restaurant, Tun Ming (also from Myanmar) ('SP7') who stayed in one of the rooms, testified that the deceased used to cook in her room. SP7 was working in the restaurant when the incident took place. He said that he had seen her bring out plates from her room to wash them in the sink. The body of the deceased was found in room 3.

[10] The appellant stayed in room 5. The occupant of room 8 was, Aung Soe Oo ('SP6'). Room 8 was located opposite room 3 and room 5. SP6 was also from Myanmar. From the sketch plan, it is quite apparent that room 8 was almost facing room 3 and the photographs show that the units were separated by a narrow corridor of around three feet in width or thereabouts. It was a narrow corridor. These accommodations were a very tight fit. The owner or person having control over the premises appears to have maximised the usage of the floor area by erecting plywood partitions to create eight rooms. The plywood partitions did not go all the way up to the ceiling and there was a wide gap from the top of the partition to the ceiling.

[11] The deceased worked in the 'chicken rice' section of the restaurant. The appellant also worked in the same section of the restaurant. According to SP3, the restaurant is located a short distance away from the hostel. Khat worked as a cook in a restaurant which was located on the ground floor of the hostel accommodation. Khat was a refugee from Myanmar. He was registered with the United Nations High Commissioner for Refugees ('UNHCR') office in Malaysia and held the UNHCR Registration Card No 791–10C03233. He did not testify at the trial as he had returned to Myanmar around 15 March 2016. The deceased was an undocumented migrant worker. She was apparently registered with a local organisation and carried a card from ZOMI Association of Malaysia Registration No ZAM-27332.

[12] The starting point and indeed, the main pillar of the prosecution's case, is the evidence of SP6. The evidence of SP6 was the most compelling piece of evidence to implicate the appellant to the murder of the deceased. SP6 also worked at the restaurant. SP6 knew the deceased and the appellant. There was no dispute that the appellant and SP6 were known to each other. They were all co-workers in the restaurant.

[13] On the morning of 16 February 2016, SP6 was in his room (room 8). He did not work that morning as his shift only started in the afternoon. At around 10am, SP6 was lying in bed and fiddling with his mobile phone, when he heard someone screaming. He quickly went out of his room, and he saw the appellant coming out of the deceased's room (room 3). SP6 said that he saw the appellant holding a blood-stained knife. There was blood on the appellant's striped T-shirt. The appellant quickly ran down the stairs. The door to room 3

A was open. SP6 went over and peeped into room 3 and saw the motionless body of the deceased lying on the floor. The body was drenched in blood. He quickly called his employer, SP3 and told him that the appellant had murdered the deceased. SP3 called the police. SP6 was afraid to go back to his room. He went to Restaurant 83 and waited for SP3 to arrive.

B

[14] The Investigating Officer, DSP (G15386) Rodney Pasla Haris ('SP11') arrived at the scene of the crime with his team of officers. The police forensic (crime scene investigation) team ('CSI team') also arrived. The leader of the CSI team was ASP Mohd Nawawi bin Yaakob ('SP9'). The CSI team took samples of blood and other specimens. They also tested for fingerprints. The CSI team recovered two knives. One knife had an orange handle and was found in room 3 (where the deceased was found). The knife was located on top of a transparent plastic box next to a wall. The knife with the orange handle was marked as police exh 'EX6' (court exh 'P30A'). There were no visible blood stains on exh P30A. The police also recovered another knife. It had a black handle with a 6-inch blade. This knife was marked as police exh 'EX11' (court exh 'P31A').

C

D

E **[15]** According to SP9, exh P31A was found at near the staircase. He said it was found, '... di luar bilik iaitu dikawasan tangga laluan masuk ke bilik-bilik. Pintu masuk kerumah pintu'. SP9 said that there were no visible blood stains on exh P30A but there were blood stains on exh P31A. The appellant was attempting to leave the country via the border in the State of Kelantan. He was apprehended by ASP Mohd Sani Bin Hussin ('SP8') on 19 February 2016 at Kampung Gual Tinggi, Rantau Panjang, Kelantan and was handed over to ASP Ismail Bin Ahmad ('SP10') the next day.

F

[16] After apprehending the appellant, SP10 handed the appellant over to SP11. On 23 February 2016, at around 1.45pm, the appellant led SP10 to a rubbish dump site located behind a shop-lot at BPU/1 Batu 14, Puchong where a pair of Lee's jeans with a belt were recovered. The jeans were a size 28. The jeans and the belt were marked as police exh 'A1' (court exh 'P41A') and police exh A2 (court exh 'P42A' respectively).

G

H

[17] On the same day at around 3pm, the appellant was taken back to the lock-up at Balai Polis USJ8 where SP10 retrieved the appellant's clothing from the cupboard where the appellant's personal belongings were kept, to wit, a white Levis Strauss T-Shirt marked as police exh A3 (court exh 'P32B').

I

[18] The deceased was identified by Khat. He accompanied the deceased to the mortuary at Hospital Serdang where the post-mortem was conducted. Khat is seen standing next to the body of the deceased in one of the photographs which was taken at the mortuary. During the trial, photographs of

the deceased were shown to SP3 and SP6 and they all identified the deceased as the person who was known as Chen, and whose body was found in room 3 on 16 February 2016.

[19] As mentioned earlier, the evidence of SP6 was critical to the prosecution's case. The relevant parts of his evidence (examination-in-chief) have been reproduced (with emphasis added) and they read as follows:

SP6 — Aung Soe Oo

S: Pada 16/2/2016 pada jam lebih kurang 10 pagi, pada masa itu Encik Aung berada dimana?

J: Saya sedang berada dalam bilik saya

S: Maksudnya di bilik Encik Aung ni dimana?

J: Bilik saya bangunan lain, bukan di bangunan restoren.

S: Encik Aung ingat alamat bilik Encik Aung?

J: Saya tidak tahu.

S: Sekarang masih tinggal di bilik itu lagi?

J: Sekarang ini tidak.

S: Siapa yang sediakan bilik ini?

J: Majikan saya

S: Tingkat berapa bilik ini?

J: Kalau kira dari bawah, tingkat 3.

S: Ada berapa bilik yang terdapat pada tingkat 3 itu?

J: Lebih kurang 6 atau 7 bilik.

S: Tadi Encik Aung kata Encik Aung buat apa 10 pagi?

J: Saya dalam bilik sedang main telefon.

S: Dan pada pagi itu, Encik Aung tidak bekerja?

J: Saya bekerja sebelah petang.

S: Semasa Encik Aung berada dalam bilik itu, siapa lagi ada bersama Encik Aung?

J: Saya seorang saja.

S: Jadi di tingkat 3 itu, Encik Aung cakap 6–7 bilik dan bilik itu semua pekerja restoran itu?

J: Benar YA.

S: Jadi semasa dalam bilik itu bermain telefon, ada apa-apa yang terjadi? Terdengar apa-apa?

J: Saya dengar orang menjerit.

S: Dia menjerit macam mana?

J: Ah Ah.

S: Dengan kuat?

J: Dengan kuat.

S: Encik Aung tahu suara itu datang dari mana?

J: Saya tak tahu suara itu datang dari mana, jadi saya keluar dari bilik dengan hati-hati untuk lihat suara itu datang dari mana. Suara itu datang dari bilik lain.

S: Encik Aung tahu dari bilik mana datang?

J: Tahu.

S: Bilik siapa?

J: *Bilik si mati*

S: Siapa nama si mati?

J: Saya tak tahu nama si mati tapi saya panggil dia 'Chen'

S: Jadi bila Encik Aung cakap suara dari bilik 'Chen', ada pergi tengok apa ada dalam bilik itu?

J: Saya tidak pergi ke bilik 'Chen', tapi *saya lihat daripada depan bilik saya*.

S: *Jadi daripada depan bilik Encik Aung, boleh nampak bilik Chen ini*?

J: *Ya, boleh nampak*.

S: Apa yang Encik Aung nampak?

J: *Saya nampak dari bilik Chen lelaki bernama That Wai keluar*.

S: *Encik Aung kenal That Wei*?

J: *Ya*

S: Boleh bagitau dimana That Wei sekarang?

J: Boleh, sana (tunjuk ke arah Tertuduh dalam kandang Tertuduh) *OKT dicamkan oleh SP6*

S: *Jadi Encik Aung nampak dia keluar dari bilik Chen, macam mana keadaan dia bila keluar*?

J: *Saya nampak That Wei pegang pisau keluar dari bilik Chen*

S: *Di tangan mana*?

J: *Saya tak pasti*

S: Tak pasti ke tak ingat?

J: Tak ingat

S: Kamu nampak tapi tak ingat?

J: Ya, benar

S: Jadi macam mana keadaan pisau itu semasa Encik Aung nampak

J: *Pisau tajam, panjang lebih kurang 6 inci, lebih kurang macam pisau potong sayur.*

S: Masa Encik Aung nampak pisau itu ada apa-apa yang Encik Aung nampak pada pisau itu?

J: *Saya nampak pada pisau itu dan nampak pada tangan That Wei pun ada darah.*

S: Encik Aung ingat OKT pakai baju apa pada masa Encik Aung nampak?

J: *Dia pakai T-Shirt warna putih yang berjalur. Di baju pun saya nampak ada darah.*

S: Di bahagian mana darah?

J: Sabagian depan. Tidak banyak darah.

S: OKT pakai seluar apa pada tarikh itu?

J: Tak ingat.

S: Seluar panjang ke pendek?

J: Seluar panjang

S: Warna?

J: Warna tak ingat.

S: Ada terdapat kesan darah pada seluar yang dipakai OKT?

J: Saya tak nampak.

S: Bila Encik Aung sudah nampak OKT dengan keadaan macam tu, ke mana dia pergi?

J: *Dia turun ke bawah.*

S: Bawah mana?

J: *Ke mana saya tak tahu, dia keluar dari pintu utama dan turun ke bawah.*

S: Cara dia turun macam mana? Dalam keadaan macam mana?

J: *Selepas dia melihat saya, dia cepat-cepat turun.*

S: Maksud cepat-cepat ni macam mana?

J: Meluru

S: Dalam keadaan Encik Aung nampak OKT ada Encik Aung cakap apa-apa dengan dia?

J: *Saya tidak cakap apa-apa dengan dia.*

S: Ada OKT cakap apa-apa dengan Encik Aung?

J: Tidak ada.

S: Selepas OKT turun ke bawah, apa yang Encik Aung buat selepas itu?

J: *Selepas saya melihat dia sudah keluar dari bilik utama, saya menelefon majikan.*

S: Siapa nama majikan Encik Aung?

J: Saya tak tau eja nama dia tapi saya panggil dia Oon

Mah: Siapa?

TPR: SP3

S: Selepas telefon, apa yang Encik Aung bagi tahu kepada Yap Tiam Oon?

J: *Saya bagitau majikan saya yang That Wai sudah bunuh Chen.*

Mah: Macam mana kamu tahu That Wai bunuh Chen? Kamu tak pergi tengok pun. Kamu dekat pintu kamu, kamu tak pergi tengok. Kamu nampak dia keluar dia turun, macam mana kamu tahu That Wei sudah bunuh Chen?

J: Saya melihat dari bilik saya pintu Bilik Chen ada terbuka sedikit. Saya melihat Chen terbaring berlumuran darah.

Mah: Sebab itu kamu bagitau Oon yang That Wei sudah bunuh Chen?

J: Benar

S: Macam mana boleh melihat dari bilik kamu?

J: *Pintu bilik Chen ada terbuka sedikit dan saya boleh lihat.*

...

S: Tadi kamu katakan OKT keluar memegang pisau, kalau menunjukkan pisau boleh kamu camkan?

J: Boleh

S: Cuba tengok gambar No. 19?

J: Ya, saya cam

SP6 camkan Gambar No. 19 di P28

S: Adakah itu pisau yang dimaksudkan?

J: Ya benar inilah pisau yang saya maksudkan

S: Dan jika ditunjuk pisau itu sendiri, boleh kamu camkan?

J: *Ya saya boleh cam*

TPR: Rujuk satu bungkusan plastik bertanda PX 6. Bersil dengan lak Jabatan Kimia. Intact.

Mah: Betul?

PB: Betul

TPR: Mohon tanda pada bungkusan sebagai ID dahulu

Bungkusan mengandungi pisau ditandakan sebagai ID30

Dikeluarkan sebilah pisau yang bertanda EX 6 yang berhulu warna Oren

Pisau berhulu warna Oren yang bertanda EX6 di jadikan sebagai ekshibit dan ditandakan sebagai ID 30(a) dan dirujuk kepada SP6.

S: Adakah pisau ini?

J: *Bukan pisau ini.*

TPR: Saya merujuk kepada satu bungkusan bertanda EX 11. Bersil Jabatan Kimia.

Mah: Intact?

PB: Intact.

Bungkusan bertanda EX11 dijadikan ekshibit dan ditandakan sebagai P31.

TPR: *Pohon untuk buka. Satu bilah pisau yang bertanda EX11 berhulu warna hitam rujuk pada saksi*.

SP6 *Ya ini ialah pisau itu*

Pisau berhulu warna hitam yang bertanda EX11 dijadikan ekshibit dan ditandakan sebagai ID P31(a) dan dirujuk kepada SP6

...

[20] We turn next to the questions that were posed to SP6 during cross-examination and his responses thereto:

S: Kamu ada bagitau kamu dengar jeritan kuat datang dari bilik si mati, betul?

J: Ya, benar

S: Boleh bagitau Mahkamah, berapa lama kamu dengar tu?

J: Beberapa saat sahaja.

S: Adakah kamu dengar orang bertekak dalam bilik itu?

J: Tidak dengar orang bertekak.

S: Adakah dengar barang dalam bilik itu jatuh?

J: Tidak dengar.

S: Rujuk P28 Gambar No 4. Berapa jauh bilik kamu dari bilik si mati?

J: 3 hingga 4 langkah.

S: Saya katakan kepada kamu Encik Aung, oleh kerana jarak adalah 3 hingga 4 langkah adalah mustahil kamu tak dengar orang bertekak, setuju atau tak setuju?

J: Sebab saya pakai earphone di telinga, sebab itu saya tidak dengar

S: Jadi jika kamu ada earphone di telinga macam mana kamu dengar jeritan kuat tu?

J: Waktu saya mula-mula pakai earphone itu ada dengar jeritan, lepas itu saya buka

earphone untuk dengar lebih jelas lagi dan saya dengar jeritan.

S: Tadi masa kamu mula-mula pakai itu, kamu dengar orang jerit la?

J: Ya, dengar

S: Orang jerit tu bermakna orang bertengkar la?

J: Tidak sama YA.

S: Adakah kamu mendengar lelaki menjerit?

J: Tidak.

S: Saya katakan kepada kamu, kamu cakap masa mula-mula itu kamu buka earphone itu untuk dengar orang jerit. Saya katakan kepada kamu kalau ada orang jerit bermakna ada orang bertengkar kalau tidak orang itu tak menjerit. Setuju tak setuju?

J: Tidak setuju.

S: Selepas awak dengar orang menjerit itu, kamu tak pergi ke bilik tolong apa yang terjadi di bilik itu?

J: Waktu pertama kali jerit itu saya ingat. Saya rasa mereka suami isteri bertengkar, lepas itu saya dengar jerit sekali lagi baru saya keluar dari bilik dan saya melihat

S: Sekarang kamu setuju la bertengkar la?

J: Maaf saya ingat mereka suami isteri bergaduh tapi lepas dengar jeritan kali kedua baru saya keluar bilik melihat.

S: Lepas dengar jeritan yang kuat baru keluar melihat?

J: Ya, benar

S: *Adakah kamu pernah kenal pekerja warga Myanmar yang bernama Mya Hlaing*?

J: *Kami sama-sama tak tau nama*

S: *Jadi kamu tak ingat*?

J: *Saya tak kenal pekerja nama Mya Hlaing*.

S: Kamu juga cakap tadi dekat Mahkamah, sebelum jadi apa-apa saya tidak nampak apa-apa. Lepas itu kamu cakap dari bilik Chen kamu nampak That Wei keluar?

J: Ya benar

S: *Cadangan saya, masa kamu cakap kamu tak nampak apa-apa, ada kemungkinan pekerja bernama Mya Hlaing telah masuk bilik si mati, setuju atau tidak*?

J: Saya tidak tahu.

S: *Saya katakan pekerja Mya Hlaing telah bertengkar dengan si mati sebab hutang yang perlu dijelaskan oleh si mati kepada Myah Laing tahu atau tidak*?

J: *Saya tidak tahu*.

S: *Saya katakan kepada kamu Mya Hlaing ini telah pergi jumpa si mati dan meminta*

balik duit daripada beliau tapi si mati tidak mahu membayar balik kepada beliau dan menolak beliau, tahu atau tidak?

J: *Saya tidak tahu*.

S: Saya katakan, *lepas ditolak Mya Hlaing telah menyerang si mati*.

J: *Saya tidak tahu*.

S: Masa itu secara kebetulan, OKT That Wei telah datang ke bilik si mati. Adakah kamu tahu atau tidak?

J: Saya tidak tahu.

S: *Saya katakan kepada kamu bahawa cerita kamu bahawa kamu nampak OKT memegang pisau adalah tidak benar, setuju atau tidak*?

J: *Saya tidak setuju*.

S: Adakah kamu nampak OKT menyerang si mati?

J: Saya tidak nampak.

S: Saya rujuk kembali kepada P28 Gambar No 4, kamu tengok di tangga ini, tempat ni gelapkan?

J: Tidak gelap. Boleh nampak.

S: *Ada lampu ke di situ*?

J: *Saya tidak ingat.*

S: *Saya katakan kepada kamu oleh kerana tempat ini adalah gelap tiada lampu, tidak mungkin kamu nampak OKT That Wei keluar dari bilik itu memegang pisau. Setuju atau tidak*?

J: *Tidak setuju*

S: *Saya juga katakan kepada kamu yang kamu nampak Mya Hlaing yang keluar dari bilik itu. Setuju atau tidak*?

J: *Tidak setuju*.

S: Dalam bilik si mati ini ada dapur kan?

J: Saya tidak tahu.

S: Ada bilik pekerja lain di Tingkat 3 yang ada dapur. Kamu tahu?

J: Tidak ada dapur dalam bilik.

S: *Saya juga katakan kepada kamu, adalah Myah Laing yang meluru dari bilik si mati, setuju atau tidak*?

J: *Tidak setuju*.

S: Saya juga katakan kepada kamu, *OKT telah keluar dari bilik itu, sebelum Mya Hlaing keluar sebab dia takut. Setuju atau tidak*?

J: *Saya tidak tahu.*

S: *Maksud peguam bila kamu nampak OKT keluar, Mya Hlaing ada dalam bilik lagi. Mya Hlaing keluar kemudian. OKT keluar dulu. Setuju atau tak setuju*?

J: *Tidak setuju.*

S: *Saya katakan awak tidak nampak OKT keluar sebab masa itu awak memang tidak nampak sebab masa itu awak masih dalam bilik memakai earphone, setuju atau tidak setuju*?

J: *Saya tidak setuju*.

S: Masa kamu pergi ke balai polis, kamu bagitau kamu pergi balai polis besar dan kecil?

J: Ya.

S: Ada kamu beritahu pada polis tentang baju dan seluar jeans yang OKT pakai?

J: Ya, ada

S: Apa yang kamu beritahu?

J: Mereka ada tanya saya pakai baju warna putih. Saya bagitau OKT pakai baju warna putih. Dia tanya pakai seluar ka? Saya ada bagitau OKT pakai seluar panjang jeans. Saya ada bagitau OKT pegang pisau keluar dari bilik si mati.

[21] We turn now to the post-mortem report. The forensic pathologist who performed the most-mortem was Dr Mohd Azali bin Ibrahim ('SP5'). According to SP5, the deceased sustained 18 wounds. The injuries were as follows:

(a) Superficial incised wound 7 x 2cm on the right shoulder. A linear abrasion 4 x 0.2cm over the right deltoid muscle area.

(b) Superficial laceration wound 1.2cm on the left shoulder and abrasion 0.2 x 0.2cm above the left breast. Superficial incised wound 5 x 0.9cm on the posterior aspect of the left shoulder.

(c) A stab wound 5.7 x 2cm on the right side of the back, 3cm from the midline and 29cm below the shoulder. The wound was 7cm deep, directed back to front, upward and slightly to the right. The right chest cavity was penetrated at a point below the 9th rib near the spine.

(d) A large incised wound 13 x 3cm over the front and right side of the neck. The right carotid artery, the right jugular vein and the trachea were cut. The skin of the area under the jawline and adjacent to this wound showed shelving of its subcutaneous tissue, the size of the injury being 10 x 2cm.

(e) Superficial incised wound 0.6cm and bruise 1 x 0.5cm on the right side of the chin.

(f) Laceration 7x1cm on the right parietal area of the head, 2.5cm from the midline. Laceration 5 x 1cm on the right fronto-parietal area of the head, 6cm from the midline and 4cm from the top of the head.

(g) Incised wound 2.5 x 0.5cm at the right angle of the mouth. Abrasion 0.5 x 0.5cm on the right jawline.

[22] SP5 opined that the fatal injury was the injury to the neck which he described as the 'incised wound to the neck'. In this regard, he found that there were injuries to the carotid artery and right jugular vein. He found the trachea to be cut. He said that death would have been quick but not necessarily instantaneous. He said that the injuries could have been caused by a sharp object, such as knife. He said that based on the injuries, there was a slim to no chance of survival for the deceased.

[23] Next, we turn to the evidence of Puan Nor Aidura bt Saidon ('SP13'). She was the scientific officer from the Forensic Division of the Chemistry Department who conducted the deoxyribonucleic acid ('DNA') analysis. She testified that the deceased's DNA was found on exh P30A and exh 31A.

[24] *She said quite unequivocally that the appellant's DNA was not found on either of the two knifes (exh P30A and exh P31A).* SP13 opined that the deceased's blood on exh P30A could have been caused by the deceased's blood being 'splattered'. She said that the deceased was the major contributor to the DNA which was found on exh P30A. She said that exh P30A had a minor contributor by an unknown male person. But the appellant was not a contributor to the DNA found on exh P30A. SP13 was very clear that the appellant's DNA was not found on exh P31A. SP13 also testified that there were blood stains on the Lee's jeans (police exh A1 — court exh P41A). The blood stains on the jeans were marked as 'A1(b)' and 'A1(c)' and that the blood stains had yielded *the deceased's DNA* as well as *the appellant's DNA*.

[25] The CSI officer (SP9) testified that fingerprint dusting of exhs P30A and P31A did not yield any results. He also said that he was not able to detect any fingerprints on the door to room 3.

[26] We turn now to the evidence of the investigating officer, SP11. His testimony (with emphasis added) during cross-examination was as follows:

S: Ada dinyatakan dalam kes ini terdapat satu baju putih dan seluar jeans oleh ASP Ismail Bin Ahmad, kamu tahu tak?

J: Saya tahu.

S: Adakah kamu acupakai seluar dan baju tersebut pada OKT?

J: Tidak.

S: Dalam kes ini SP6 iaitu Aung Soe Oo telah memberitahu bahawa baju yang dipakai oleh orang yang keluar dari bilik si mati mempunyai darah, tapi baju putih yang telah diambil tidak mempunyai kesan darah, tahu tak?

J: Tahu.

S: Baju putih dan seluar jeans ini dirampas oleh siapa kamu tahu?

J: ASP Ismail.

S: Baju dan seluar tersebut ditunjukkan oleh siapa?

J: Ditunjukkan balik oleh Tertuduh.

S: Saya katakan oleh kerana baju putih yang ada di Mahkamah P24, tak ada kesan darah dan baju yang dikenal pasti oleh SP6 ada kesan darah maka saya katakan kepada kamu yang kamu sudah buat tangkapan yang silap?

J: Tidak.

S: *Adakah kamu siasat mengenai penglibatan seseorang warga Myanmar bernama Mya Hlaing dalam kes pembunuhan ini*?

J: *Tiada dalam pengetahuan saya.*

S: Saya katakan kepada kamu *OKT pada hari itu 16.2.2016 telah berjumpa dengan Mya Hlaing pada jam lebih kurang 8 pagi dan Mya Hlaing ajak OKT untuk meminum arak ada dalam pengetahuan kamu*?

J: *Tiada dalam pengetahuan saya*.

S: *Saya katakan selepas itu lebih kurang 9 pagi, Mya Hlaing ada beritahu pada OKT dia mahu jumpa si mati untuk meminta duit hutang daripadanya, kamu tahu*?

J: *Tiada dalam pengetahuan saya*.

S: Saya katakan *OKT telah pergi ke Hero Mart di Batu 14 Puchong untuk beli charger handphone dan lepas 20 minit balik ke rumah flat nya, adakah kamu tahu*?

J: *Saya tidak tahu*.

S: Selepas itu *di Tingkat 2 Flat tersebut, OKT terdengar pergaduhan mulut pertengkaran dengan kuat dan banyak bising ada kamu tahu tentang ini*?

J: *Tiada maklumat dalam siasatan saya*.

S: *Saya katakan lepas itu OKT lari naik ke tingkat 3 untuk lihat apa yang terjadi.OKT masuk ke bilik yang datangnya bunyi bising itu, dan OKT nampak Mya Hlaing ada darah di bajunya*?

J: *Tiada maklumat sedemikian dalam siasatan saya*.

S: *Selepas itu Mya Hlaing telah beritahu OKT, si mati telah tolak Mya Hlaing dan dia terjatuh dan selepas itu Mya Hlaing telah naik marah dan bergelut dengan si mati dan telah memotong si mati, ada kamu tahu*?

J: *Tiada maklumat sedemikian dalam siasatan saya*.

S: *Selepas itu OKT telah tarik Mya Hlaing keluar dari bilik si mati dan semasa sedang tarik, ada sedikit darah terkena pada seluar OKT setuju*?

J: Tiada maklumat ke atas siasatan saya.

Mah: Bukan 'Tiada maklumat dalam siasatan saya'. Sebenarnya 'Dalam siasatan saya tiada perkara ini itu maksudnya bukan Tiada maklumat dalam siasatan saya'.

J: Betul.

Mah: Saya faham yang awak maksudkan tapi ayat itu tak betul tu. Yang membawa maksud dalam siasatan kamu perkara itu tidak benar la, betul?

J: Ya, saya.

S: Saya katakan, selepas itu OKT telah berlepas pada 17.2.2016 dari Puchong ke Kelantan untuk pergi ke Thailand, setuju?

J: Saya setuju.

S: Dalam siasatan kamu, adakah kamu siasat terdapat pergelutan antara penyerang dan si mati?

J: Ada.

S: Saya katakan berdasarkan kepada pergelutan itu, ada kemungkinan bahawa, si mati telah menemui ajalnya secara accidental semasa pergelutan berlaku?

J: Saya tak setuju.

PB: Itu saja

SP11 dibebaskan.

...

Mah: Nak hantar pakaian itu ke Jabatan Kimia untuk apa itu?

J: Untuk analisa DNA.

S: DSP tidak bersetuju apabila dicadangkan bahawa oleh kerana baju putih tersebut tidak ada kesan darah, maka DSP sudah buat tangkapan yang salah mengapa DSP tidak bersetuju?

J: Saya tidak bersetuju kerana tempoh kejadian dan tempoh tangkapan adalah jarak jangkamasa yang panjang dan besar kemungkinan pakaian tersebut telah dibersihkan.

Mah: Berapa lama, cuba kira balik?

J: Pohon rujuk dokumen. YA tarikh kejadian dilaporkan pada 16.2.2016 manakala tangkapan pada 19.2.2016 maka 3 hari.

S *Mengapa DSP tidak bersetuju apabila dicadangkan bahawa semasa hendak nak menarik Mya Hlaing, pisau yang dipegang yang ada darah telah terkena OKT*?

J: *Saya tidak bersetuju kerana tiada maklumat sebegitu dalam siasatan.*

S: Kemudian dicadangkan oleh peguam bahawa OKT berasa takut dan telah meluru keluar dari bilik itu dan menuju ke biliknya di tingkat 3 dan terus kemaskan pakaian, DSP tidak bersetuju dengan soalan cadangan ini. Mengapa?

J: Saya tidak bersetuju kerana dalam siasatan saya, saya mendapati masih terdapat pakaian OKT di dalam biliknya. Cuma fizikal OKT tiada di tempat kejadian.

S: DSP telah menyatakan bahawa DSP ada siasat samada ada pergelutan antara OKT bersama si mati tetapi DSP tidak bersetuju apabila dicadangkan bahawa berdasarkan kepada pergelutan itu ada kemungkinan bahawa si mati telah mati secara accidental. Mengapa DSP tidak bersetuju?

J: Melalui siasatan yang telah dibuat YA., kesan luka sayat pada leher si mati bukan merupakan kesan luka kecedaraan yang tidak disengajakan.

Mah: DPP tak ada ke dalam Bahasa Inggeris untuk luka sayat?

TPR: Dalam Bahasa Inggeris 'Slash wound'.

Mah: Bukan 'Slash wound', dalam laporan perubatan doctor kata 'Incised wound' on the neck. It has to based on Laporan Pakar.

TPR: Itu saja soalan saya

[27] It is quite clear from the notes of evidence that during the prosecution's case, the appellant's counsel did confront SP6 and SP11 with the theory that one Mya Hlaing had committed the crime. To be fair to the appellant, other prosecution witnesses, namely SP3, SP4 and SP7, were also asked whether they knew the person by the name of Mya Hlaing. They replied in the negative. They had no idea who this person was. The prosecution's case was that exh P31A (knife with the black handle which was blood stained and found near the stairs) was the murder weapon. SP13 had stated in evidence that the appellant's DNA was not found on exh P31A. We turn next to the judge's findings at the end of the prosecution's case.

END OF THE PROSECUTION'S CASE — THE JUDGE'S FINDING

[28] The duty of the judge at the end of the prosecution's case is prescribed by s 180 of the Criminal Procedure Code. It provides that:

180 Procedure after conclusion of case for prosecution

(1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a prima facie case against the accused.

(2) If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal.

(3) If the Court finds that a prima facie case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.

(4) For the purpose of this section, a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[29] The judge made the following findings at the end of the prosecution's case:

[16] Mahkamah telah meneliti dan membuat penilaian maksima ke atas semua keterangan yang dikemukakan oleh pendakwaan. Mahkamah ini juga telah menimbang dengan teliti hujahan bertulis peguambela tertuduh dan timbalan pendakwa raya serta meneliti otoriti-otoriti yang dirujuk.

[17] Di dalam kes ini pihak pendakwaan bergantung kepada peruntukan yang terkandung dicabang ketiga s 300 Kanun Keseksaan iaitu s 300(c) Kanun Keseksaan. Setelah menilai keseluruhan keterangan pada peringkat ini, mahkamah mendapati terdapat keterangan terus mengenai tertuduh ada memegang pisau [P31(A)] ke tempat kejadian, dan kemudiannya pisau tersebut ada dijumpai ditinggalkan di tempat kejadian. Pisau [P31(A)] tersebut terbukti telah digunakan dengan niat untuk mendatangkan kecederaan ke atas si mati dan tertuduh sebagai seorang yang munasabah pasti mempunyai pengetahuan bahawa kecederaan tersebut boleh menyebabkan kematian kepada si mati atau pada lazimnya adalah mencukupi dan menyebabkan kematian si mati. Oleh itu adalah jelas perbuatan tertuduh tersebut tergolong di bawah s 300(b) dan 300(c) Kanun Keseksaan.

Dalam mana-mana keadaan pun, mahkamah ini mendapati telah terbukti satu kes prima facie terhadap tertuduh seperti dalam pertuduhan yang dihadapinya.

[18] Bagi pertuduhan yang dihadapi oleh tertuduh terdapat empat inti pati perlu dibuktikan oleh pihak Pendakwaan iaitu:

(i) Berlakunya kematian seorang manusia iaitu si mati;

(ii) Kematian si mati disebabkan kecederaan yang dialami oleh si mati;

(iii) Kecederaan pada si mati adalah disebabkan oleh perbuatan tertuduh;

(iv) Dalam menyebabkan kecederaan ke atas si mati, tertuduh telah bertindak sama ada:

(a) *Dengan niat menyebabkan kecederaan yang mana tertuduh mengetahui kecederaan tersebut boleh menyebabkan kematian* di bawah s 300(b) Kanun Keseksaan, atau;

(b) Dengan niat menyebabkan kecederaan yang mana kecederaan tersebut diketahui *sebagai memadai dan mencukupi dalam keadaan biasa dan lazimnya akan menyebabkan kematian* di bawah s 300(c) Kanun Keseksaan.

Elemen (i)

[19] Pihak pembelaan mempertikaikan identiti si mati bukanlah seorang wanita yang bernama Cing Huai Vung. Peguambela berhujah bahawa pihak pendakwaan gagal mengemukakan sebarang keterangan dokumen sokongan seperti paspot dan/atau kad UNCHR bagi membuktikan identiti si mati.

Maka dengan itu pihak Pembelaan menghujahkan bahawa berkemungkinan si mati bukanlah orang yang sama seperti mangsa dalam pertuduhan pindaan (P2). Pada hemat mahkamah, identiti si mati telahpun dicamkan oleh SP7 yang merupakan

rakan si mati yang bekerja di Restoran 83 dan SP6 juga merupakan rakan sekerja si mati serta tinggal bersebelahan dengan bilik si mati. Tambahan pula, identiti si mati telah disahkan oleh SP3 iaitu majikan kepada si mati dan SP5 iaitu pakar patalogi forensik yang melakukan bedah siasat ke atas si mati. *Pegawai penyiasat (SP11)* yang hadir ke tempat kejadian sejurus menerima laporan berkenaan kejadian turut mengesahkan bahawa identiti si mati adalah seorang wanita yang sama seperti dalam pertuduhan pindaan (P2) iaitu Cing Huai Vung.

Elemen (ii)

[20] Bagi perkara ini pihak pendakwaan telah mengemukakan keterangan pakar patalogi forensik (SP5) yang menjalankan bedah siasat ke atas si mati. Menurut SP5, terdapat beberapa kecederaan luaran pada tubuh badan si mati hasil daripada pemeriksaan luaran yang dijalankan olehnya. Kecederaan-kecederaan yang dialami oleh si mati itu telah diperincikan oleh SP5 seperti berikut:

(1) Luka hiris 7 x 2sm yang tidak dalam di bahu kanan. Luka lecet 4 x 0.2 sm di bahagian otot bahu kanan.

(2) Luka koyak yang tidak dalam 1.2sm di bahu kiri dan luka lecet 0.2 x 0.2sm di payudara kiri. Luka hiris yang tidak dalam 5x0.9sm di bahu kiri belakang.

(3) Luka tikam 5.7 x 2sm di bahagian kanan belakang, berkedalaman 7 sm dan mencederakan rongga dada kanan.

(4) Luka hiris 13 x 3sm di bahagian depan dan kanan leher. Pembuluh darah dan vena dan salur udara telah terhiris oleh luka ini. Kulit di bawah dagu juga menunjukkan luka hiris.

(5) Luka hiris yang tidak dalam 0.6sm dan lebam 1 x 0.5sm di kanan dagu.

(6) Luka koyak 7 x 1sm di bahagian kanan atas kepala. Luka koyak 5 x 1sm di bahagian atas hadapan kanan kepala.

(7) Luka hiris 2.5x0.5sm di sudut mulut kanan. Luka lecet 0.5 x 0.5sm di rahang bawah kanan.

(8) Dua luka lecet masing-masing 2 x 1sm di jari ketiga kanan. Luka hiris 1sm di jari keempat kanan.

(9) Luka hiris berganda di jari-jari tangan kiri. Luka hiris 6 x 3sm di belakang pergelangan tangan kiri.

[21] Menurut SP5, pemeriksaan dalaman bahagian leher menunjukkan pembuluh darah carotid kanan, vena jugular kanan dan salur udara trakea terhiris. Otot leher hadapan dan kanan juga terhiris bersama tulang rawan kelenjar thyroid. SP5 membuat dapatan bahawa punca dan sebab kematian ialah *'incised wound to the neck'*.

[22] Sehubungan dengan itu, niat untuk menyebabkan kecederaan yang diketahui boleh menyebabkan kematian di dalam sesuatu kes boleh disimpulkan daripada fakta kecederaan si mati, senjata yang digunakan serta tempat dan masa kesalahan tersebut berlaku (*Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174). Pada hemat mahkamah ini, kecederaan yang diakibatkan ke atas si mati yang merupakan

punca kematian si mati adalah disebabkan secara terus akibat perbuatan tertuduh. *Mahkamah akui bahawa tidak ada sebarang keterangan yang dikemukakan oleh mana-mana saksi pendakwaan yang melihat perbuatan tertuduh semasa mencederakan si mati.* Namun, mahkamah ini telah meneliti dan membuat keputusan untuk menerima keterangan mengikut keadaan *'circumstansial evidence'* yang diberikan oleh SP6 bagi mengaitkan tertuduh dengan kematian si mati.

[23] Berdasarkan keterangan SP6 menyatakan bahawa telah melihat tertuduh telah keluar dari dalam bilik si mati sambil memegang pisau berhulu plastik warna hitam [P31(A)] dan juga melihat baju T berjalur warna putih yang dipakai oleh tertuduh mempunyai kesan darah di bahagian hadapan baju T tersebut. Tambah SP6 lagi, dia melihat tertuduh telah turun melalui tangga dengan keadaan yang bergesa-gesa kearah tingkat bawah setelah keluar dari dalam bilik si mati tersebut.

[24] Selain daripada itu, keterangan ahli kimia (SP13) yang telah menjalankan analisa DNA ke atas pisau [P31(A)] menemukan satu profil DNA bercampur dari sekurang-kurangnya dua (2) individu telah diperolehi. Hasil analisa menunjukkan profil DNA yang diambil dari specimen darah tertuduh adalah konsisten sebagai penyumbang major kepada profil DNA bercampur tersebut. Keterangan ini dapat mengukuhkan lagi inferens bahawa pisau [P31(A)] tersebut merupakan senjata yang digunakan oleh tertuduh untuk mencederakan si mati sehingga menyebabkan kematiannya. Selain itu, mahkamah telah meneliti laporan kimia (P18) yang tidak mengaitkan orang lain [selain daripada tertuduh] kepada pisau [P31(A)] tersebut. SP13 juga telah menemukan satu profil DNA lelaki telah diperolehi daripada kesan darah pada seluar jeans [P41(A)] yang dijumpai daripada milikan tertuduh semasa ditahan di negeri Kelantan dan berpadanan dengan profil DNA yang diperolehi daripada specimen darah tertuduh.

Elemen (iii): Seksyen 300(c) Kanun Keseksaan

[25] Mahkamah ini juga menilai keterangan pakar patologi forensik (SP5) yang menyatakan bahawa terdapat sebanyak sembilan (9) kesan luka pada tubuh si mati. Seperti disahkan oleh SP5 dalam laporan bedah siasat (P26) bahawa sebab atau punca kematian si mati adalah disebabkan oleh luka hiris di leher atau 'incised wound to the neck'.

[26] Selepas meneliti kesan-kesan luka pada tubuh si mati, mahkamah ini mendapati perbuatan tertuduh adalah terjumlah kepada perbuatan dengan niat untuk mendatangkan kecederaan ke atas si mati dan kecederaan yang diniatkan tersebut mencukupi pada lazimnya untuk menyebabkan kematian si mati di bawah *s 300(c) Kanun Keseksaan* (*Public Prosecutor v Visuvanathan* [1978] 1 MLJ 159 dirujuk).

[27] Mahkamah ini juga membuat rujukan kepada kes *Tan Buck Tee v Public Prosecutor* [1961] 1 MLJ 176, dengan memetik perenggan seperti berikut:

> There was the body with five appalling wounds on it, wounds penetrating to the heart and liver*, which must have been caused by violent blows with a heavy sharp instrument like an axe. In the absence of anything else, whoever inflicted those blows must have intended to kill the person on whom they were inflicted.* There was no evidence as to the circumstances surrounding the killing. No question of insanity or provocation or self-defence or anything else was raised by the defence. There

was not a scrap of evidence with which any such defence could be even remotely linked up. The only question for the jury to consider was whether they were satisfied beyond reasonable doubt that it was the appellant who inflicted the injuries. If they were so satisfied then it was their duty to say he was guilty of murder. If they were not so satisfied then it was their duty to say he was not guilty. *In these circumstances it would have been quite adequate had the judge merely told the jury that murder is the deliberate killing by one human being of another, that is killing with the intention to kill.* (Penekanan ditambah.)

[28] Di dalam kes ini, suatu inferen yang munasabah boleh dibuat dari kecederaan-kecederaan pada tubuh badan si mati yang diakibatkan oleh kesan luka hiris dan tusukan berganda dan punca kematian si mati adalah daripada luka hiris atau kelar pada leher. Keterangan SP6 yang melihat tertuduh memegang pisau [P31(A)] yang terdapat kesan darah telah dengan kukuh disokong oleh keterangan pakar patalogi (SP13) yang mengatakan terdapat 9 kesan luka pada tubuh si mati dengan satu kesan kelar pada leher si mati yang merupakan kecederaan paling bahaya (fatal) dan boleh menyebabkan kematian dengan cepat. Melihat dari keterangan SP13 dan kecederaan yang dialami oleh si mati, telah mencukupi untuk mahkamah ini membuat dapatan bahawa tertuduh mempunyai niat untuk mencederakan si mati kerana kecederaan-kecederaan tersebut yang dikenakan di bahagian penting badan si mati terutamanya di leher yang boleh membawa maut.

[29] Mahkamah ini mendapati sesuai untuk pemakaian s 300(c) Kanun Keseksaan dalam situasi ini kerana adalah jelas dilihat daripada kecederaan-kecederaan si mati terutamanya di bahagian leher dan penggunaan senjata berbahaya seperti pisau pemotong sayur [P31(A)] menunjukkan tanpa silap menuju kepada satu kesimpulan saja yang tidak boleh disangkal mengenai kebersalahan tertuduh yang melakukan perbuatan bunuh terhadap si mati di dalam kes ini.

MOTIF PEMBUNUHAN

[30] Dalam kes ini, pihak Pendakwaan telah berhujah dengan membuat rujukan kepada kes *Public Prosecutor v Sunny Ang* [1966] 2 MLJ 195; [1965] 1 LNS 171 bagi membuktikan elemen motif pembunuhan si mati. Namun, mahkamah ini menolak hujahan pihak Pendakwaan dan ingin menekankan bahawa 'motif' bukanlah salah satu elemen yang perlu dibuktikan di bawah kesalahan Seksyen 302 Kanun Keseksaan. Namun begitu, motif adalah relevan dan wajar diberi pertimbangan jika terdapat keterangan mengenainya. Rujukan kepada kes *Sunny Ang* oleh Timbalan Pendakwa Raya adalah tidak terpakai ke dalam kes di hadapan Mahkamah ini. Dalam kes *Sunny Ang*, wujud beberapa faktor luaran yang menyokong wujudnya motif pembunuhan seperti status tertuduh yang telah bankrap menunjukkan tertuduh dalam keadaan yang terdesak untuk mendapatkan wang melalui tuntutan insurans. Selain itu, mangsa yang bernama 'Jenny' memiliki beberapa polisi insurans di mana ibu kepada tertuduh telah pun dinamakan sebagai benefisiari dalam salah satu polisi insurans milik Jenny. Berbeza dengan kes semasa, pihak Pendakwaan tidak dapat membuktikan elemen motif tertuduh untuk melakukan bunuh ke atas si mati walaupun ada cadangan yang mengatakan ianya melibatkan hutang. Namun, Mahkamah ini berpendapat sekalipun motif tersebut tidak dibuktikan, perbuatan tertuduh yang berniat mencederakan si mati kerana terdapat sembilan kesan luka pada tubuh badan si mati serta mengelar lehernya

adalah jelas tergolong bawah *s 300(c) Kanun Keseksaan*.

ISU BERBANGKIT

[31] Peguambela tertuduh telah membangkitkan isu berkenaan keterangan SP6 yang menunjukkan bahawa tertuduh bukanlah individu yang melakukan perbuatan bunuh ke atas si mati. Peguambela mempertikaikan keterangan SP6 yang melihat tertuduh keluar daripada bilik si mati dengan memegang sebilah pisau [P31(A)] dan memakai sehelai baju T berjalur berwarna putih dan terdapat kesan darah pada bahagian hadapan baju T tersebut kerana SP6 telah gagal mengecamkan baju T berjalur berwarna putih yang dipakai oleh tertuduh tersebut. Hujah peguambela lagi, pihak Pendakwaan kemudiannya cuba untuk mengemukakan sehelai baju T berwarna putih [P32(B)] semasa bicara, namun tiada kesan darah ditemui pada baju T [P32(B)] tersebut. Lebih meragukan adalah baju T [P32(B)] tersebut juga tidak memiliki jalur seperti yang dinyatakan oleh SP6.

[32] Mahkamah telah meneliti keterangan saksi SP6 dan SP11 (the IO) untuk merungkai isu yang dibangkitkan oleh peguambela tertuduh. Melalui keterangan, mahkamah ini mendapati baju T berwarna putih [P32(B)] itu tidak mempunyai kesan darah. Ini membawa maksud bahawa terdapat kemungkinan ianya bukanlah baju yang dipakai oleh tertuduh pada hari kejadian. Namun, mahkamah telah memberikan perhatian lanjut kepada sehelai seluar jeans (P24) dan tali pinggang warna merah berjenama 'Jeep' [P42(A)] yang dirampas oleh SP10 ketika tertuduh memandu arah pihak polis untuk mengesan barang kes yang berkaitan. Hasil analisa yang dijalankan oleh SP13 ke atas seluar jeans (P24) tersebut, telah menunjukkan satu profil DNA lelaki telah diperolehi daripada kesan darah pada P24 yang sepadan dengan profil DNA yang diperolehi daripada spesimen darah tertuduh. Mahkamah ini membuat satu dapatan bahawa ketiadaan baju T berjalur atau ketiadaan kesan darah pada baju T putih [P32(B)] tidak membawa kesan mencacatkan kes Pendakwaan atau inferens yang memihak kepada Pembelaan. Malahan, wujud keterangan yang lebih daripada saksi-saksi pendakwaan yang dapat disimpulkan dan menuding jari kepada tertuduh sebagai pelaku kepada perbuatan dengan niat mencederakan si mati yang membawa kepada kematian si mati.

[33] Mahkamah Rayuan pernah memutuskan isu ketiadaan DNA atau darah mahupun cap jari tertuduh tidak semestinya bermaksud tertuduh tersebut tidak berada di tempat kejadian seperti yang berlaku di dalam kes semasa bahawa tertuduh ada dilihat oleh SP6 berada di tempat kejadian sama seperti yang terjadi di dalam kes *Lim Hean Chong @ Teo Hean Chong v Public Prosecutor* [2012] 1 MLJ 149:

> [37] *It is true that neither the appellant's finger print nor any DNA that matched his profile were found at the crime scene. However, it was clear from the evidence that the appellant was present at the crime scene.*
>
> As such we found no merit in the appellant's argument that the absence of any forensic link had weakened the case for the prosecution or raised doubt in the prosecution's case. (Penekanan ditambah.)

[34] Perkara ini berlaku di dalam kes ini, di mana terdapat keterangan terus bahawa tertuduh adalah individu yang telah dilihat di tempat kejadian sejurus selepas

kejadian berdasarkan keterangan SP6 yang telah melihat tertuduh keluar dari dalam bilik si mati dengan keadaan tergesa-gesa dan memegang sebilah pisau [P31(A)] yang terdapat kesan darah.

[35] Selanjutnya, di dalam kes *Haridaran Gurappan v Public Prosecutor v Sunny Ang* [2016] MLJU 1698; [2016] 1 LNS 56 Mahkamah Rayuan memutuskan dan dipetik seperti berikut:

> [26] Hakim bicara yang bijaksana dalam penghakiman beliau telah membuat pemerhatian dan dapatan terhadap isu-isu yang sama yang dibangkitkan oleh peguambela perayu-perayu yang terpelajar. Kami perturunkan dapatan hakim bicara seperti di muka surat 41–42 RR Jld 1, seperti berikut:
>
> 'The parang (E10; P19) was also found negative of blood-stain, that is to say, no DNA was detected on swab of parang (P23). In these matter where the results of items collected at the scene of crime or any items in relation with the case at hand and the finding of the forensic negated the presence of any of the accused's DNA profiling or any other profiling that would provide any assistance of any sort, *these failures should not be taken as the end of the prosecution's case as the complainant's evidence against the totality of his evidence and the probabilities of the case, yet to be tested.* Further, the failure to obtain a positive match for any profiling from any of such specimen maybe that the samples given for the DNA profiling was insufficient or the samples have been degraded. Degraded means the quality for DNA profiling had been manipulated. There are three (3) factors where the samples could be manipulated:
>
> – Exposed to high temperature
>
> – High moisture
>
> – Attack by bacteria or fungus
>
> *In the instant case neither blood was found on the parang nor any DNA profiling extracted by the forensic chemist because the parang was found on the 12.12.2010 by SP7 and Sgt. Rosland at the scene of crime about three (3) months after the crime incident and I believe it was then exposed to and manipulated by the temperaments of weather. Therefore in this instant case with such rationalization; the determination of whether that was the very weapon used and by such person could not rest solely on the result of the DNA profiling alone. It has to be read together with the rest of prosecution's evidence in totality' …*
>
> [29] *Kami sebulat suara bersetuju dengan dapatan-dapatan yang telah dibuat oleh hakim bicara tersebut di atas.* (Penekanan ditambah.)

[36] Mahkamah ini berpegang teguh kepada praktis untuk menilai keterangan secara keseluruhan (totality) dan dengan ini mendapati keterangan SP6 yang disokong oleh keterangan saksi lain seperti SP3, SP7, SP11 dan SP13 telah mencukupi untuk membuktikan penglibatan tertuduh di dalam kematian si mati.

KES *PRIMA FACIE*

[37] Di akhir kes pendakwaan, mahkamah ini telah membuat penilaian secara maksima dan berpuas hati atas kesemua keterangan terus dan keterangan mengikut keadaan (circumstantial evidences) yang telah dinilai secara terperinci dan maksima

mendapati bahawa pihak pendakwaan telah berjaya membuktikan suatu kes prima facie terhadap tertuduh seperti yang dipertuduhkan dalam P2 (*Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734; *Balachandran v Public Prosecutor* [2005] 2 MLJ 301).

[38] Oleh itu, tertuduh telah dipanggil untuk membela diri. Setelah diterangkan alternatif untuk membela diri, tertuduh memilih untuk memberikan keterangan secara bersumpah dari kandang saksi. Hanya tertuduh sahaja dikemukakan sebagai saksi di pihak pembelaan.

THE DEFENCE

[30] The appellant confirmed that he entered Malaysia legally and had a valid work permit to work in the country. He denied that he had murdered the deceased. Essentially, the defence hinged on the existence of a person of Myanmar origin by the name of 'Mya Hlaing', who allegedly worked in the vicinity of the restaurant. According to the appellant, the deceased had borrowed from Mya Hlaing and the latter was having difficulty getting back his money from the deceased. The appellant said that at around 7am, Mya Hlaing and he had consumed alcohol. Mya Hlaing told the appellant that he was going to see the deceased to get his money back.

[31] The appellant's version is that around 9 to 9.30am he had purchased a charger from the Hero supermarket and was walking up the stairs to go to his room, when he heard the scream of a female person. Then he heard a loud 'doom' sound as if someone or something had fallen. He then saw Mya Hlaing coming out of the deceased's room. He was covered in blood. He pulled Mya Hlaing to one side and shoved him away. He then went over to the deceased's room to see what had happened. He saw the deceased lying on the floor covered in blood. He asked her what had happened. She did not respond. Mya Hlaing ran off quickly. The appellant got scared. He decided to return to Myanmar. He went to his room, took some clothes and left the hostel. He enlisted the help of a fellow Myanmar citizen by the name of Hla Shawe who was an 'agent' who could facilitate his journey out of the country. That night he stayed with Hla Shawe. He then headed for the border in Kelantan. He was apprehended in Rantau Panjang. He testified in the Myanmar language.

[32] The relevant part of the appellant's evidence (examination-in-chief) reads as:

S: Pada 16.2.2016 jam lebih kurang 10 pagi awak berada di mana?

J: Saya pulang daripada gerai ke rumah setelah membeli charger handphone.

S: Dari mana kamu beli charger handphone?

J: Saya beli di Hero Market.

S: Kamu pulang ke rumah di mana?

J: Saya balik ke rumah yang beza jaraknya antara rumah dan kedai satu flat saja.

S: Kamu tinggal di flat?

J: Ya rumah flat.

S: Saya rujuk kepada Gambar P28(1) dan P28(2). Adakah ini gambar flat?

J: Ya.

S: Setelah kamu balik ke rumah, apa yang berlaku?

J: Setelah saya sampai ke tingkat 2, saya terdengar satu suara. Jeritan dan nada bunyi macam barang jatuh. Macam bunyi 'doom'.

S: Rumah kamu tingkat berapa?

J: Rumah saya tingkat tiga.

S: Saya rujuk kepada Gambar P28(3) dan P28(4). Mana bilik kamu? Adakah boleh nampak atau tak tahu?

J: Tak pasti.

S: Awak tinggal dalam flat yg kamu kata tadi, adakah dia satu bilik atau macam mana? Rumah?

J: Ada banyak bilik. Ada 8 atau 9 bilik satu floor.

Setelah kamu dengan bunyi 'Doom' itu apa yang kamu buat?

Mah: Dia dengar bunyi di Tingkat 2?

PB: Ya.

Mah: Maknanya kamu belum sampai ke tingkat kamu la, kamu dengar bunyi?

J: Bunyi jeritan bunyi 'Doom'

Mah: Bukan soal bunyi jeritan bunyi 'Doom'. Kamu dengar itu masa kamu di tingkat 2, kamu belum naik ke tingkat 3 ke tempat bilik kamu.Betul?

J: Ya.

S: Tadi kamu nyatakan kamu dengar jeritan. Jeritan itu jeritan siapa? Perempuan ke lelaki?

J: Suara perempuan.

S: Lepas kamu dengar jeritan suara perempuan itu, apa kamu buat?

J: Saya berlari naik ke atas ke tingkat 3.

S: Adakah kamu pergi ke tempat dimana jeritan itu datang?

J: Saya ada pergi.

Mah: Saya tak faham. Kamu naik sampai tingkat 2 kamu dengar jeritan, kamu lari naik atas, macam mana kamu pergi ke tingkat 2 balik? Tanya dia balik.

J: Saya di tingkat 2, saya dengar jeritan dari tingkat 3 dan saya pergi ke tempat yang saya dengar jeritan itu.

S: Bila kamu sampai ke tempat kamu dengar jeritan itu di tingkat 3, apa kamu lihat?

J: Saya jumpa dengan seorang lelaki bernama Mya Hlaing.

S: Setelah kamu jumpa dia apa dia sedang buat?

J: Saya nampak pada badan dia berlumuran darah.

S: Lepas itu?

J: Saya tarik dia daripada tepi, tolak keluar..

Mah: Tolak keluar dia dari mana?

J: Saya tolak ke kawasan tangga yang turun ke bawah.

S: Adakah kamu nampak apa-apa lagi di situ?

J: Selepas tolak, saya pergi ke bilik perempuan itu dan bertanyakan kepada perempuan itu yang baring di tepi pintu bilik dia.

S: Awak ada bercakap bertanya kepada dia, apa?

J: Saya bertanya apa berlaku.

S: Lepas itu?

J: Dia tak jawab apa-apa sedangkan mata dia celik dan berlumuran darah yang banyak.

S: Adakah awak nampak perempuan ini di dalam bilik ke diluar bilik?

J: Dalam bilik.

S: Adakah awak kenal perempuan itu?

J: Kenai [sic].

S: Siapa dia?

J: Saya tidak tahu nama sebenar dia. Gelaran dia Ching Ma yang bermaksud perempuan berketurunan Ching.

S: Adakah kamu tanya Mya Hlaing kenapa badan dia berlumuran darah?

J: Saya tak soal dia apa-apa. Saya panggil dia keluar saja.

S: Saya rujuk sekali lagi pada P38 Gambar No 5 dan 6. Adakah ini gambar bilik yang dimaksudkan dan adakah ini gambar perempuan yang kamu jumpa?

J: Ya.

S: Setelah awak tanya perempuan itu dan setelah awak tidak terima apa-apa jawapan dari dia, apa kamu buat?

J: Oleh kerana dia tidak menjawab apa-apa saya terkejut dan lari ke bilik saya. Bilik saya dan bilik dia selang satu bilik.

S: Lepas itu apa kamu buat?

J: Saya pun mengambil sedikit pakaian saya, saya takut dan saya pun lari turun ke bawah dan apabila sampai bawah saya pergi ke arah TESCO.

S: Apa yang terjadi kepada MyaHlaing ini, adakah kamu nampak dia?

J: Saya tak jumpa MyaHlaing, dia sudah lari turun.

S: Lari ke mana kamu tahu?

J: Saya tak tahu.

S: Mya Hlaing tu adakah kamu kenal sebelum itu?

J: Kenai [sic] YA.

S: Dia kerja dimana sebelum itu?

J: Dia kerja sebagai renovate rumah. Dia duduk di flat satu lagi.

S: Jadi dia tidak kerja dengan kamu la di restoren?

J: Tiada.

S: Masa awak nampak dia dekat bilik itu dengan darah, dia pakai baju warna apa?

J: Pakaian bola. Jersey Machester.

S: Warna?

J: Warna putih.

S: So kamu nampak darah berlumuran di baju dia?

J: Ya.

S: Adakah kamu tahu mengapa Mya Hlaing pergi berjumpa perempuan itu ataupun berada di bilik si mati itu?

J: Saya tahu, dia minta hutang.

S: Adakah kamu tahu hutang apa?

J: Saya tak tahu.

S: Macam mana kamu tahu dia jumpa si mati untuk tuntut hutang?

J: Sebelum itu pada jam 7 lebih pagi, Mya Hlaing dan saya ada minum minuman keras. Dalam pukul 9 hingga 9.30 pagi saya pergi beli charger dekat market, dia bagitau saya dia nak pergi minta hutang.

S: Dari siapa?

J: Ching Ma perempuan itu.

S: Setelah awak lari ke arah TESCO, apa awak buat?

J: Saya buat keputusan saya ingin pulang ke Negara asal, pulang ke Myanmar. Saya cari ejen yang boleh hantar saya ke Myanmar. Saya bertemu dengan Hla Shawe. Saya bertemu demgam ejen bernama Hla Shawe. Dia kata dia boleh uruskan saya

pulang ke Negara asal. Malam itu saya tidur di rumah Hla Shawe.

S: Dimana rumah dia?

J: Dekat TESCO. Keesokan pagi dia hantar saya ke stesen bas yang dekat dengan TESCO itu juga.

S: Awak nak menuju kat mana?

J: Saya menaiki bas ke Kelantan.

S: Awak telah nampak kejadian seorang perempuan berlumuran darah, seorang lelaki berlumuran darah lari dari tempat itu, mengapa awak tidak buat laporan polis atau beritahu polis mengenai kejadian itu?

J: Saya takut saya akan ditangkap.

S: Kenapa kamu tak memberitahu majikan kamu?

J: Saya dalam keadaan dan tak terfikir berjumpa dengan majikan.

S: Awak telah mengambil bas menuju ke Kelantan. Di Kelantan apa yang terjadi?

J: Mula-mula saya sampai Kelantan saya naik kereta ke sempadan Thailand apabila sampai ke sempadan Malaysia dan Thailand, mereka hantar saya ke sempadan sebelah Thailand. Polis Thailand telah menangkap saya. Setelah 2 hari saya disimpan di lokap, Jabatan lmigresen Thailand. Tempat yang kumpul orang yang nak balik Myanmar.

S: Selepas kamu ditangkap polis di Thailand, simpan dalam lokap lepas itu?

J: Saya disimpan 2 hari di lokap imigresen lepas itu saya diambil oleh polis Malaysia dari Kelantan.

S: Setelah kamu di Kelantan, apa yang berlaku?

J: Saya disimpan di Kelantan, 1 atau 2 malam selepas itu polis dari Subang datang ambil saya.

S: Adakah semasa di Balai Subang, ada kamu beritahu mengenai individu bernama Mya Hlaing?

J: Saya ada bagitau tapi mereka tak faham. Saya tak pandai Bahasa Melayu. Saya suruh mereka panggil kedutaan Myanmar. Apabila saya suruh mereka memanggil Embassy, mereka memukul saya.

S: Semasa awak memanggil Mya Hlaing semasa awak tarik dia keluar, adakah awak nampak dia memegang apa-apa?

J: Saya nampak di tangan dia pisau dan di tubuh dia berdarah.

S: Apa yang terjadi kepada pisau itu kamu tahu?

J: Saya tak tahu.

S: Adakah apa-apa darah terkena pada baju kamu atau seluar kamu?

J: Tiada.

[33] The testimony of the appellant during cross-examination was as follows:

PEMERIKSAAN BALAS

S: Encik That Wai sepanjang perbicaraan ini, awak telah mendengar seluruh keterangan saksi, saksi yang telah memberi keterangan. Setuju?

J: Ya.

S: Dan diantara saksi-saksi yang datang memberi keterangan adalah Aung Sae Oo (SP6) dan Khun Ming (SP7)

J: Ya.

S: Dan lagi satu yang memberi keterangan terhadap awak adalah Yap Tiam Oon (SP3) dan Yap Tien Seng (SP4).

J: Saya tak ingat.

S: Setuju dengan saya Aung Soe Oo (SP6) dan Khun Ming (SP7) adalah rakan sekerja awak?

J: Rakan sekerja tapi bukan tempat sama. Saya jual bahagian Nasi Ayam, mereka bahagian air.

S: Setuju dengan saya, Aung Soe Oo (SP6) dan Khun Ming (SP7) tidak pernah ada apa-apa perselisihan faham dengan awak?

J: Tak pernah.

S: Setuju dengan saya, Yap Tiam Oon (SP3) dan Yap Tien Seng (SP4) adalah juga pemilik kedai atau dengan erti kata lain majikan awak?

J: Saya tak ingat nama.

Mah: Mereka ada datang beri keterangan kamu nampak tak?

J: Ada

Mah: Majikan kamu?

J: Ya.

S: Setuju dengan saya, majikan kamu juga tidak pernah ada apa-apa perselisihan faham dengan kamu?

J: Ada sedikit tidak sefahaman dengan seorang bos.

S: Bos yang mana satu? Yang rambut panjang ke rambut pendek?

J: Yang rambut panjang.

Mah: SP berapa?

J: SP4, Yang Arif

S: *Saya katakan kepada kamu Aung Soe Oo (SP6) adalah saksi yang telah melihat kejadian ini, setuju atau tidak setuju?*

J: *Tak setuju.*

S: Aung Soe Oo dalam keterangannya tidak pernah menimbulkan nama Mya Hlaing setuju tidak?

J: Tak faham.

Mah: Kamu duduk dalam Mahkamah masa saksi Aung Soe Oo (SP6) beri keterangan. Kamu dengar keterangan dia. Dia tidak pernah timbulkan nama Mya Hlaing, setuju tak setuju?

J: Setuju.

S: Saya katakan dia tidak pernah timbulkan nama Mya Hlaing kerana sememangnya Mya Hlaing tidak ada di tempat kejadian?

J: Tak setuju.

S: *Setuju dengan saya bahawa SP6 iaitu Aung Soe Oo telah melihat kamu yang memegang pisau?*

J: *Tak setuju.*

S: *Oleh kerana kamu yang memegang pisau sebab itu Aung Soe Oo (SP6) menyebut nama kamu bukan nama Mya Hlaing setuju atau tidak?*

J: *Tidak setuju.*

Mah: Just satu soalan saja yang berkaitan dengan tempat kejadian itu. lkut cerita kamu, kamu ada ternampak Mya Hlaing, perempuan itu, kamu ada ternampak Aung Soe Oo tak? Dia ada kat situ ke?

J: *Saya tak nampak SP6.*

S: Tadi kamu kata selepas kamu melihat perempuan itu kamu melarikan diri ke bawah, ke TESCO dan setelah itu kamu melarikan diri ke Kelantan. Betul ya?

J: Ya.

S: Jadi macam mana kamu nak nafikan bahawa Aung Soe Oo nampak kamu sedangkan keterangan dia tempoh hari dia mengatakan dia nampak kamu pegang pisau, dia nampak kamu. Kamu pegang pisau kemudian kamu lari. Macam mana kamu nak nafikan ni? Macam mana kamu nak nafikan dia ada di situ?

J: *Jika saya pegang pisau itu, mesti ada thumbprint saya dekat pisau itu, kalau di baju saya darah mesti polis dapat baju saya.*

S: Saya tak cakap pasal baju kamu ada darah, pisau itu ada thumbprint kamu. Saya cakap yang kamu cakap kamu telah turun setelah kamu lihat perempuan itu, kamu telah lari turun. Tetapi dalam masa yang sama kamu cakap Aung Soe Oo tiada di situ.

J: Saya tak nampak.

S: *Saya katakan kepada kamu, Aung Soe Oo berada di tempat kejadian, melihat kamu keluar dari bilik Si Mati memegang pisau ditangan kamu, setuju atau tidak setuju?*

J: *Tidak setuju.*

S: Setuju dengan saya, kerana dia berada di situ maka dia nampak kamu lari seperti mana keterangan kamu yang kamu kata kamu lari. Sebab dia berada disitu lah dia nampak. Setuju atau tidak bersetuju?

J: Saya tak tahu.

S: Tadi keterangan kamu bahawa semasa kamu berada di Tingkat 2 kamu mendengar satu bunyi 'DOOM' benda jatuh. Setuju dengan saya bahawa sesungguhnya tiada lansung bunyi benda jatuh, setuju dengan saya?

J: Tak setuju.

S: Setuju kalau ada bunyi 'DOOM' benda jatuh dia akan mengeluarkan bunyi yang kuat yang akan menyebabkan orang lain akan datang ke situ untuk melihat apa yang berlaku?

J: Jika mereka ada berdekatan, mereka akan datang.

S: Setuju dengan saya kalau satu benda kuat jatuh dan menghasilkan bunyi 'DOOM' dia akan menyebabkan lantai pecah tetapi tidak ada lansung kesan pecah dilantai. Setuju dengan saya?

J: Dia bunyi 'DOOM' tu bukan bunyi dari lantai. Dia macam bunyi dinding bukan lantai.

S: Setuju dengan saya bahawa baru sekarang kamu kata bunyi ini macam dinding. Bukan tadi kamu kata. Setuju dengan saya?

J: Ya setuju.

S: Setuju dengan saya bahawa kamu kata tadi kamu dengar perempuan menjerit baru bunyi 'DOOM'. Setuju dengan saya yang perempuan itu menjerit bukan kerana ada bunyi 'Doom' tetapi sesungguhnya kamu yang telah melakukan sesuatu, kamu yang menikam perempuan ini sehingga berdarah, setuju?

J: Tak setuju.

S: Setuju dengan saya bahawa kerana perempuan itu telah berdarah, dan kerana kamu yang telah memegang pisau menyebabkan Aung Soe Oo yang mendengar bunyi jeritan pada ketika itu, keluar dari biliknya dan melihat kamu yang memegang pisau. Bukan kamu yang melihat Mya Hlaing yang memegang pisau?

J: Tidak setuju.

S: Tadi kamu kata setelah kamu melihat perempuan itu berdarah dan melihat Mya Hlaing berada disitu kamu tarik ke bawah, selepas itu kamu lihat perempuan itu berasa kamu berasa takut dan kamu lari. Setuju dengan saya bahawa apa yang kamu cakap ini menipu?

J: Tidak setuju.

S: Kamu boleh dengan beraninya menarik tangan Mya Hlaing tapi kenapa tiba-tiba kamu berasa takut dan kamu lari. Kerana itu saya katakan kamu menipu setuju atau tidak?

J: Tidak setuju.

S: Saya katakan kepada kamu takut bukan kerana kamu melihat perempuan itu tapi kamu takut sebab kamu yang telah membunuh perempuan itu, sebab itu kamu takut setuju atau tidak setuju?

J: Tidak setuju.

S: Kamukah yang melakukan perbuatan iaitu membunuh perempuan ini atau tidak?

J: Tidak.

S: Jadi kamu tidak bersalah la?

J: Tidak bersalah.

S: Jadi kamu tidak perlu takut setuju atau tidak setuju?

J: Tidak setuju.

S: Mya Hlaing dah lari. Sekarang kamu pun lari. Kamu kata kamu takut tapi dalam masa yang sama kamu kata kamu tak bersalah. Saya katakan kepada kamu kalau kamu takut dalam keadaan kamu tak bersalah, ada banyak pilihan yang kamu boleh buat. Pertama kamu boleh beritahu Aung Soe Oo (SP6) sebab dia rakan sekerja kamu walaupun kamu tak kenal dia tapi disebabkan kamu tak buat apa-apa, orang bersalah kalau tidak buat apa-apa dia boleh beritahu orang lain apa yang berlaku apa yang dia nampak, tapi kamu tak beritahu. Yang kedua kamu boleh beritahu majikan kamu Yap Tiam Oon (SP3) majikan kamu tu tak ada apa salah pun dengan kamu dan kamu pun tak ada apa salah pun dengan dia. Yang ketiga, kamu boleh report polis terus bukan terus lari ke Kelantan. Sila jawab setuju atau tidak setuju.

J: Saya dalam keadaan mabuk, saya terkejut sehingga saya terjumpa benda berdarah macam ini. Mabuk pun hilang saya tak dapat buat keputusan yang tepat.

Mah: Itu jawapan kamu ya?

J: Itu saja.

S: Saya katakan kepada kamu, orang yang mabuk tidak berasa takut setuju?

J: Tidak setuju. Orang yang mabuk pun takut juga.

S: Tapi orang yang mabuk tak akan lari sampai Kelantan?

J: Saya cuma lari sampai TESCO dan bukan Kelantan.

S: Kalau macam tu sama la juga. Baik saya rephrase. Kalau orang itu mabuk dia tidak akan takut dan tak akan lari ke TESCO, hanya orang waras saja bila dia tahu dia melakukan sesuatu dia akan takut dan terus lari dan terus ke TESCO, faham tak? untuk akan menghilangkan diri dia. Kalau dah mabuk dah tentu tak sedar, buat apa dia nak takut. Setuju tidak?

J: Tidak setuju.

Mah: Kejap ya ini cerita pasal mabuk ni. Pada masa itu kamu mabuk, lepas kamu nampak itu kamu hilang mabuk betul ya? Atau masih mabuk?

J: Bukan hilang semuanya mabuk. Ada juga mabuk.

Mah: Masih mabuk lagi ya. Lepas itu lari sampai TESCO mabuk lagi tak?

J: Langsung tak mabuk.

Mah: Terus tak mabuk dah? Jumpa satu orang tu ejen tu mabuk lagi tak?

J: Tidak mabuk.

Mah: Tidur rumah ejen itu malam itu mabuk lagi tak?

J: Tidak mabuk.

Mah: Besok pagi itu mabuk lagi tak?

J: Tidak.

Mah: Lari sampai Kelantan mabuk lagi tak?

J: Tak mabuk.

Mah: Sekarang kita dah tahu kamu tak mabuk lagi di peringkat mana. OK kamu jumpa ejen ini, kamu tidur rumah dia, kamu cerita tak d [sic] apa yang kamu cerita di Mahkamah hari ini tentang kamu suruh dia atur kamu balik Myanmar? Kamu tak salah Mya Hlaing yang salah.

J: Tak cerita saya bilik tidak sama. Tidur bilik tak sama.

Mah: Tapi kamu bercakap tak?

J: Tak cakap.

Mah: Tak cakap? Habis macam mana dia tahu kamu nak balik Myanmar kalau kamu tak cakap kat dia? Corret [sic] me if I am wrong

J: Saya cakap untuk pulang ke Negara asal saja. Saya tak cakap pasal benda ini.

Mah: Jadi kamu tak cerita la yang kamu nampak Mya Hlaing pegang pisau lari turun lari semua ni. Kamu tak cerita la kejadian ini. Kamu cuma cerita kamu nak balik Myanmar minta dia aturkan. Kenapa kamu tak cerita kat Hla Shawe? Kamu tak salah, orang lain yang salah buat benda ni. Kenapa tak cerita pada Hla Shawe? Kamu dah tak mabuk.

J: Bukan hal saya, saya tak bersalah, saya tak mau ambil tahu.

Mah: Jadi yang kamu nampak perempuan ni kena tikam ni bukan hal kamu jadi kamu tak mau cerita pada dia?

J: Berkaitan dengan Mya Hlaing bukan berkaitan dengan saya.

Mah: Kenapa tak cerita pada Hla Shawe dan kenapa nak lari balik Myanmar?

J: Itu bukan sebab saya jadi saya tak cerita.

S: Jadi saya katakan kepada kamu kalau bukan sebab kamu bermakna tak ada sebab la kamu nak berasa takut dan nak lari setuju atau tidak?

J: Saya bukan lari cuma pulang ke Negara asal.

Mah: Kamu beritahu majikan kamu tak kamu nak pulang ke Negara asal ambil gaji kamu, ambil passport kamu ambil dokumen kamu. Bagitau bas kamu, kamu nak

berhenti kerja ambil gaji ambil pakaian kamu ambil passport balik Negara asal. Ada bagitahu tidak?

J: Pernah bagitahu sebulan sebelum itu.

Mah: Soalan saya pada hari itu. Hari kamu nampak itu, hari kamu lari turun pergi tesco besoknya pergi Kelantan terus pergi Myanmar. Beritahu tak?

J: Tak.

Mah: Kenapa tak bagitahu sebab kamu nak pulang ke Negara asal?

J: Sebab sudah settle YA. sudah dapat gaji.

Mah: Kenapa kamu tak bagitahu kamu nak balik ke Negara asal? Saya bukan cakap pasal gaji. Tiba-tiba saja nak pergi kenapa tak bagitahu?

J: Sebab saya takut.

Mah: Takut apa?

J: Saya terkejut tengok keadaan ini. Rasa takut dalam hati dan lari.

S: Saya katakan kepada kamu bahawa kamu tidak memberitahu kawan-kawan kamu dan majikan kamu serta kamu takut kerana sesungguh membunuh atau menyebab kematian mangsa. Setuju atau tidak?

J: Tidak setuju.

S: Saya katakan kepada kamu, kamu tidak mempunyai sebab untuk takut kalau kamu tidak lakukannya setuju atau tidak setuju?

J: Tidak setuju.

S: Saya katakan kepada kamu, kamu tidak perlu lari dengan tiba-tiba setelah kejadian tersebut setuju tidak setuju?

J: Tidak setuju.

S: Saya katakan kepada kamu bahawa kamu mabuk adalah dusta semata-mata. Setuju tak setuju?

JB: Dia kata tak tipu tapi dia tak mau jawab.

Mah: Kena jawab, ini TPR katakan kepada kamu. Kena jawab setuju atau tidak setuju. Kalau tidak betul jangan setuju la. TPR kata keterangan kamu yang kamu kata kamu mabuk ada dusta semata-mata. Setuju tidak setuju?

J: Tidak setuju.

S: Saya katakan sebab kalau kamu mabuk, kamu tak boleh beli charger telefon sebelum kamu naik ke bilik kamu setuju atau tidak setuju?

J: Tak setuju.

S: Dan saya katakan kepada kamu bahawa kenyataan kamu keterangan kamu yang Mya Hlaing yang memegang pisau dan berada di tempat tersebut juga adalah tipu dan dusta semata-semata kerana yang sebenarnya yang berada di tempat kejadian

yang melihat kamu memegang pisau adalah Aung Sae Oon (SP6). Itu saja soalan saya YA.

J: Tak setuju.

PB: Jika diizinkan boleh sambung re esok?

Mah: No no today. I want to finish this today. Esok ada saksi lain lagi?

PB: Tiada.

Mah: Tak ada kalau habiskan hari ini la. Re tak panjang pun.

FINDING AT THE END OF THE DEFENCE

[34] The judge made the following findings at the end of the case for the defence. He said:

DAPATAN MAHKAMAH DI AKHIR KES PEMBELAAN

[40] Mahkamah ini telah meneliti dan menimbangkan seluruh keterangan pembelaan dan menilai semula keterangan pendakwaan dan seterusnya membuat dapatan bahawa pihak pembelaan telah gagal menimbulkan keraguan yang munasabah terhadap kes pendakwaan.

[41] Pihak pembelaan sepatutnya meletakkan kesnya di peringkat kes pendakwaan untuk mengelakkan prinsip pemikiran kemudian (*afterthought)* kerana peruntukkan undang-undang telah menyatakan pihak pembelaan berhak untuk mendirikan kesnya dan menimbulkan keraguan yang munasabah walaupun di tahap kes pendakwaan (*Public Prosecutor v Lin Lian Chen* [1991] 1 MLJ 316) dengan cara meletakkan fakta pembelaan semasa saksi-saksi pendakwaan memberi keterangan.

[42] *Terdapat banyak fakta-fakta baru di dalam keterangan pembelaan yang langsung tidak ditimbulkan di peringkat kes pendakwaan.* Fakta-fakta baru tersebut yang hanya ditimbulkan sewaktu tertuduh memberikan keterangan adalah seperti berikut:

42.1 Ketika berada di tingkat 2, tertuduh terdengar suara jeritan seorang perempuan dan bunyi seperti barang jatuh dari tingkat 3 dan terus berlari ke tingkat 3. *Disitu tertuduh nampak seorang lelaki bernama 'Mya Hlaing' yang penuh dengan kesan darah. tertuduh telah menarik 'Mya Hlaing' dan menolaknya ke kawasan tangga untuk turun ke tingkat bawah; Tambah tertuduh lagi lelaki bernama 'Mya Hliang' telah lari turun ke tingkat bawah dan tidak diketahui ke mana 'Mya Hliang' pergi.*

42.2 Selepas itu, tertuduh telah pergi ke bilik si mati dan nampak si mati dalam keadaan terbaring di tepi pintu di dalam biliknya. tertuduh bertanyakan apakah yang telah berlaku kepada si mati. Menurut tertuduh, keadaan si mati berlumuran darah tetapi matanya masih lagi celik. Namun, si mati tidak menjawab pertanyaan tertuduh dan menyebabkan tertuduh terkejut lalu lari ke biliknya yang selang satu bilik bersebelahan dengan bilik si mati;

42.3 *Tertuduh mengenali 'Mya Hliang' yang bekerja sebagai tukang rumah yang tinggal di sebuah flat yang berlainan dengan tempat tertuduh tinggal. Pada waktu*

kejadian, tertuduh melihat 'Mya Hliang' memakai pakaian jersi bola 'Manchester' berwarna putih dalam keadaan berlumuran darah. tertuduh memberitahu Mahkamah bahawa tujuan 'Mya Hliang' datang berjumpa dengan si mati adalah untuk meminta hutang. Ini kerana 'Mya Hliang' telah memberitahu tertuduh tentang perkara tersebut kepada tertuduh semasa mereka minum arak pada jam 7.00 pagi hari itu.

42.4 Kerana perasaan takut, tertuduh telah mengambil beberapa helai pakaian di biliknya lalu turun ke tingkat bawah dan pergi ke arah pasaraya Tesco.

42.5 Keterangan tertuduh mengenai tujuannya pergi ke pasaraya Tesco untuk mencari agen bagi membantunya pulang ke Myanmar. Di sana, tertuduh telah berjumpa dengan seorang seorang agen bernama 'Hla Shawe' yang sudi menolongnya untuk pulang ke negara asalnya. tertuduh juga telah tidur di rumah 'Hla Shawe' yang terletak di kawasan Tesco pada malam tersebut. Pada keesokan harinya, tertuduh telah menaiki sebuah bas menuju ke Kelantan;

42.6 tertuduh menyatakan tidak melaporkan kejadian pada hari itu kerana takut ditangkap oleh pihak polis. tertuduh juga tidak memaklumkan majikannya (SP3) kerana tidak terfikir untuk memberitahu majikannya (SP3).

[43] Fakta-fakta dari keterangan tertuduh (SD1) yang disebut di atas itu tidak pernah ditimbulkan oleh pembelaan semasa pemeriksaan saksi-saksi pendakwaan khususnya SP3, SP6, SP7, dan SP11 yang menyatakan mereka telah berada di tempat kejadian sejurus ianya berlaku. Terdapat percanggahan yang nyata di antara keterangan tertuduh dan SP6 yang berada di tempat kejadian.

Mahkamah telah membuat pemerhatian kepada keterangan SP6 dan SP7, selaku rakan sekerja si mati juga *langsung tidak disoal tentang versi pembelaan bahawa si mati telah dicederakan oleh tertuduh dan kewujudan penama 'Mya Hliang' yang dikatakan telah melarikan diri selepas membunuh si mati* serta penama 'Hla Shawe' yang dikatakan telah menolong tertuduh untuk pulang ke negara Myanmar. *Tidak ada mana-mana saksi Pendakwaan yang disoal berkenaan penama ini sepanjang kes Pendakwaan dijalankan. Malahan, sewaktu prosiding berlangsung dengan keterangan SP11 (pegawai penyiasat) langsung tidak disoal balas oleh pihak Pembelaan berhubung dengan versi pembelaan yang tersebut di atas.*

[44] Untuk ini mahkamah bersetuju dengan kes yang dirujuk oleh pihak Pendakwaan iaitu *Megat Halim bin Megat Omar v Pendakwa Raya* [2008] MLJU 647; [2009] 1 CLJ 154, di mana Hakim Mahkamah Rayuan, Abdull Hamid Embong J (pada ketika itu) mengatakan:

> [63] *Although in our criminal jurisprudence, there is no burden on an accused person to prove his innocence but merely for him to raise a reasonable doubt as to his guilt, it is trite that his defence should be put to the prosecution at an early stage during the prosecution case. Failure to do so may move the trial court to dismiss a particular line of defence as an afterthought, or a recent invention as happened in this case.* (Penekanan ditambah.)

[45] Mahkamah ini juga merujuk kes *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 yang dipetik seperti berikut:

> *Failure of the defence to cross-examine the prosecution witness on a crucial part of the*

case will amount to an acceptance of the witness's testimony. (Penekanan ditambah.)

[46] tertuduh di dalam keterangannya cuba memberikan penjelasan tentang kejadian yang melibatkan dirinya dan si mati pada masa kejadian. Malah tertuduh juga cuba menjelaskan punca bagaimana si mati berada dalam keadaan terbaring dan berlumuran darah *dengan menuduh seorang penama 'Mya Hliang' dengan alasan menuntut hutang daripada si mati.* Mahkamah juga mendapati keterangan pembelaan mengenai penama 'Hla Shawe' yang dikatakan akan menolong tertuduh pulang ke negara Myanmar tidak pernah diajukan kepada mana-mana saksi Pendakwaan.

[47] Selain itu, mahkamah juga meneliti bahawa keterangan pembelaan telah gagal untuk menimbulkan keraguan tentang kewujudan darahnya yang terdapat pada sepasang seluar jeans [P41(A)] dan *pisau pemotong sayur berhulu plastik berwarna hitam [P31(A)] yang sangat jelas menunjukkan profil DNA tertuduh*. Ini amat jelas menunjukkan keterangan tertuduh di sini adalah bersifat *afterthought* dan merupakan suatu cubaan untuk membuat penafian semata-mata.

Keterangan tertuduh seperti di atas yang tidak pernah langsung ditimbulkan semasa di peringkat kes pendakwaan ini telah membolehkan Mahkamah ini meragui kebenarannya dan kredibiliti tertuduh kerana keterangan sebegini hanya ditimbulkan di saat-saat terakhir. Pendekatan ini diambil dengan panduan dari kes *Tan Kim Ho v Public Prosecutor* [2009] 3 MLJ 151, Mahkamah Persekutuan menyatakan:

> [36] *This is however not to say that there is any burden placed on the accused to disprove any guilt or to prove innocence. It is only assessing the credibility of a witness, in this case the second appellant's credibility. In order to determine whether an accused was telling the truth, one of the consideration is whether he had indicated his defence during the prosecution's case.* (Penekanan ditambah.)

[48] Selain itu, mahkamah ini menilai semula kesemua keterangan di dalam kes pendakwaan dan mendapati pembelaan tertuduh adalah sengaja direka-reka dan merupakan penafian semata-mata (*Jaafar bin Ali v Public Prosecutor* [1998] 4 MLJ 406; *Public Prosecutor v Tan Chai Hing* [2016] MLJU 708).

Melalui penelitian kepada versi Pembelaan tertuduh yang menyatakan telah menarik dan menolak penama 'Mya Hliang' ke arah tangga selepas tertuduh melihat 'Mya Hliang' dalam keadaan berlumuran darah. Perbuatan tertuduh tersebut adalah tidak logik dan tidak dapat diterima akal. Tiada penjelasan dapat disimpulkan tentang tindakannya yang melepaskan 'Mya Hliang' yang lari turun ke tingkat bawah lalu menghilangkan diri.

[49] Lebih memusykilkan mahkamah ini, apabila tertuduh mengatakan dia berasa takut setelah melihat si mati dalam keadaan berlumuran darah dan terbaring di dalam bilik dan segera pergi ke biliknya untuk mengambil beberapa helai pakaian lantas menuju ke arah pasaraya Tesco. Mahkamah mengambil kira tujuan tertuduh datang ke negara ini ialah untuk bekerja. Menurut keterangannya, tertuduh telah ada pekerjaan tetap dan mempunyai permit kerja, mendapat gaji dan mempunyai tempat tinggal. Namun, tertuduh memutuskan untuk melarikan diri kerana takut selepas melihat mayat si mati semata-mata tanpa memberitahu sesiapapun. Adakah wajar atau munasabah tindakan yang diambil oleh tertuduh untuk meninggalkan

Negara ini sekiranya tertuduh tidak bersalah? Ini adalah suatu kelakuan yang merupakan fakta yang relevan untuk diambil kira di bawah seksyen 8, Akta Keterangan dan perlu diperjelaskan oleh tertuduh dibawah seksyen 9, Akta yang sama.

Namun penjelasan kerana takut setelah melihat keadaan si mati adalah sesuatu yang tidak munasabah atas imbangan kebarangkalian di dalam kes ini. Jika benar 'Mya Hliang' yang telah mencederakan si mati, tertuduh sepatutnya menahannya atau memberi keterangan kepada pihak polis dan bukannya melarikan diri.

[50] Adalah nyata keterangan versi pembelaan didapati bercanggah dan tidak menimbulkan keraguan yang munasabah ke atas keterangan versi pendakwaan. Sekiranya benar tertuduh tidak melakukan perbuatan mencederakan si mati, tidak logik untuk tertuduh berasa takut dan melarikan diri daripada tempat kejadian. Satu-satunya alasan yang diberikan oleh tertuduh adalah kerana dirinya mabuk pada pagi itu dan tidak mengingati kejadian secara jelas. Namun, apabila diajukan dengan soalan adakah tertuduh masih mabuk semasa pergi ke Tesco, tertuduh menyatakan tidak lagi mabuk. Pembelaan tertuduh yang saling bercanggah ini secara nyata merupakan cerita yang dicipta kemudian oleh tertuduh.

[51] Kegagalan pihak pembelaan untuk meletakkan versinya di peringkat pendakwaan seawal mungkin dan keterangan tertuduh yang tidak masuk akal itu membolehkan mahkamah ini menolak keterangannya dan mendapati pembelaan telah gagal untuk membangkitkan sebarang keraguan yang munasabah terhadap kes pendakwaan. Mahkamah ini merujuk dan menggunapakai penghakiman dalam sekali lagi merujuk kepada kes *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561 yang menyatakan:

> *The trial judge appreciated correct law when he held, as he did in fact hold, that the defence is entitled, through cross examination of prosecution witnesses, to put its case at the earliest possible state. Indeed, it behoves the defence to do so, for me need hardly say that if a defence is sprung in Court for the first time when the accused makes his defence from the witness box or the docks so that the prosecution is taken by surprise the accused run the risk of being criticized for having kept his defence 'up his sleeve'; so as to speak, and it being branded as a recent invention.* (Penekanan ditambah.)

[52] Berdasarkan alasan-alasan yang dinyatakan di atas, mahkamah ini memutuskan di akhir perbicaraan kes ini bahawa pihak pendakwaan telah berjaya membuktikan kesnya terhadap tertuduh melampaui keraguan yang munasabah setelah menimbangkan keseluruhan keterangan yang disampaikan oleh saksi-saksi pendakwaan dan pembelaan tersebut. tertuduh telah gagal menimbulkan sebarang keraguan yang munasabah ke atas kes Pendakwaan tersebut.

KEPUTUSAN

[53] Oleh yang demikian, mahkamah ini mendapati tertuduh bersalah dan mensabitkan tertuduh di bawah s 302 Kanun Keseksaan dan menjatuhkan hukuman yang ditetapkan iaitu hukuman mati.

A THE ISSUES ON APPEAL

[35] The main complaint that was advanced by counsel for the appellant was that at the end of the prosecution's case, the judge took into account non-existent evidence and made an erroneous evaluation under s 180 of the Criminal Procedure Code. According to counsel for the appellant, at the end of the prosecution's case, the judge had concluded that the appellant's DNA was found on exh P31A (the knife with the black handle). Secondly, after the defence was called, the judge had wrongly assumed that the (alleged) existence and involvement of Mya Hlaing was something new and brought up only during the defence stage. Thus, the judge concluded that it was an 'afterthought'. He rejected the Mya Hlaing theory.

[36] In this regard the first issue ie, presence of the appellant's DNA on exh P31A, counsel for the appellant drew our attention to the evidence of SP13 who confirmed that the appellant's DNA was not found on either of the exhibits. The learned deputy public prosecutor also confirmed this.

[37] As for the issue on whether Mya Hlaing's name was brought up during the prosecution's case, counsel also referred to various parts of the notes of evidence which showed that Mya Hlaing's name was brought when the following witnesses testified, namely, SP3, SP6, SP7 and SP11.

[38] Hence, counsel contended that factually the judge was wrong in concluding that the name Mya Hlaing was brought up for the first time during the defence stage. Counsel also said that the appellant was not conversant in the national language and whilst he was being interviewed by the police, he had asked for the services of a Myanmar translator.

[39] According to the appellant, when he asked for a translator, the police beat him up. Counsel said that the judge's error in terms of his misappreciation of the evidence as to the DNA on exh P31A and the Mya Hlaing theory was highly prejudicial to the appellant. There was therefore a misdirection which vitiated the judge's findings, at the end of the prosecution's case and defence ought not to have been called. Next, there was a perpetuation of the misdirection at the end of the defence stage when the judge again (erroneously) referred the appellant's DNA on exh P31A and observed (wrongly) that Mya Hlaing's name was not brought up during the prosecution's case. Counsel contended that as a result, the appellant was not given a fair trial, and that there was a miscarriage of justice and was therefore, entitled to an acquittal.

OUR ANALYSIS

[40] It would be convenient to deal with the issues in the order in which they were raised by counsel for the appellant. The starting point is the judge's conclusion at the end of the prosecution's case that the appellant's DNA was found on exh P31A.

[41] In this regard, the judge was mistaken in concluding that the appellant's DNA was found on exh P31A (the knife with the black handle). The judge's conclusion in this regard was repeated when he analysed the evidence at the end of the case for the defence.

[42] The next issue is regarding the Mya Hlaing theory. The judge said that the issue of Mya Hlaing's involvement was an 'afterthought' as this was not put to the prosecution's witnesses. Counsel for the appellant pointed to several parts of the notes of evidence which showed quite clearly and unmistakably that the name Mya Hlaing was put to the following witnesses during the prosecution's case, namely, SP3, SP4, SP6, SP7 and SP11.

[43] In fact, the record shows that during the prosecution's case, when SP7 was testifying, the judge intervened and obtained a clarification from counsel who appeared for the appellant that it was not being suggested that Mya Hlaing was also a worker in the restaurant. It was at that juncture that counsel for the appellant confirmed to the judge that Mya Hlaing was not a worker in the restaurant and that he worked in the vicinity of the restaurant.

[44] And in so far as SP6 and SP11 are concerned, the name Mya Hlaing was not just brought up causally but rather, the appellant's version was in fact put to these two witnesses.

[45] Thus, it could not have escaped the judge's attention that the name Mya Hlaing was brought up at several intersections of the evidential process during the prosecution's case. Be that as it may, the fact is that the Mya Hlaing theory was robustly brought up, particularly during cross-examination of SP6 and SP11.

[46] Hence, it was argued that judge's errors amounted to a serious misdirection which vitiated his findings at the end of the prosecution's case and at the end of the trial. We may recapitulate by stating that the issue of misdirection stems from the judge's findings during the prosecution's case and repeated during the defence stage of the trial, that the appellant's DNA was found on exh P31A and that questions pertaining to the existence or involvement of Mya Hlaing were an 'afterthought' as they were not put to the witnesses during the prosecution's case. Having examined the record of appeal,

in particular the notes of evidence, we agree with the submissions that were made on behalf of the appellant, that the judge erred in making those conclusions alluded to earlier.

[47] The critical question is whether the judge's error vitiates his decision that a prima facie case for an offence under s 302 of the Penal Code had been established, and whether the perpetuation of the same error when the judge came to consider the case at the end of the defence stage, similarly vitiated the judge's decision that the prosecution had proven beyond reasonable doubt that the appellant had committed the offence of murder under s 302 of the Penal Code.

[48] Before commencing our discussion on this issue, it is necessary to mention that the Court of Appeal has powers to dismiss an appeal notwithstanding the errors if it is of the opinion that there was no substantial miscarriage of justice. We start with s 60 of the Courts of Judicature Act 1964 on the 'Powers of the Court of Appeal' which provides as follows:

> (1) At the hearing of an appeal the Court of Appeal shall hear the appellant or his advocate, if he appears, and, if it thinks fit, the respondent or his advocate, if he appears, and may hear the appellant or his advocate in reply, and *the Court of Appeal may thereupon confirm, reverse or vary the decision of the High court, or may order a retrial or may remit the matter with the opinion of the Court of Appeal thereon to the trial court, or may make such other order in the matter as to it may seem just, and may by that order exercise any power which the trial court might have exercised*:
>
> Provided that *the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred*. (Emphasis added.)

[49] The next statutory provision that must be considered is s 422 of the Criminal Procedure Code which provides as follows:

> Section 422 — Criminal Procedure Code
>
> Subject to the provisions contained in this Chapter *no finding*, sentence or order passed or made *by a Court of competent jurisdiction shall be reversed or altered on account of-*
>
> (a) *any error, omission or irregularity* in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or *during trial* or in any inquiry or other proceeding under this Code;
>
> (b) the want of any sanction; or
>
> (c) *the improper admission or rejection of any evidence*, *unless such* error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice. (Emphasis and underlining added.)

[50] These statutory provisions were recently considered by the Court of Appeal in the case of *Koong Swee Kwan v Public Prosecutor* [2020] MLJU 648; [2020] 7 CLJ 67; [2020] AMEJ 0516 (CA) ('Koong Swee Kwan'). It would suffice for present purposes, if we were to adopt the following passages from the judgment in *Koong Swee Kwan* which we find to be both relevant, and instructive:

> [22] Therefore, we agree with learned counsel for the appellant that the learned Judicial Commissioner erred when he said that the evidence of SP13 and SP14 were not challenged. *However, the misdirection of a trial judge in considering the evidence or the law will not automatically earn an acquittal or a retrial for a convicted person unless it is sufficiently serious to cause a miscarriage of justice. The eventuality of judicial misdirection in the course of a criminal trial has been anticipated and provided for in written law.* Section 60 of the Courts of Judicature Act 1964 ('CJA') which states the powers of the Court of Appeal when hearing criminal appeals contains the following important proviso:
>
> Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred. (Emphasis added.)
>
> [23] This provision echoes s 422 of the Criminal Procedure Code that reads as follows:
>
> > Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of —
> >
> > (a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceeding under this Code;
> >
> > (b) the want of any sanction; or
> >
> > (c) the improper admission or rejection of any evidence,
> >
> > unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.
>
> [24] As noted by the Federal Court in *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193; [2006] 2 CLJ 129, the expressions 'miscarriage of justice' and 'failure of justice' mean the same thing, ie, when justice fails or miscarries. The principle that a conviction should only be overturned if the misdirection in question occasions a failure of justice or miscarriage of justice has been applied in a number of cases by our superior courts. In *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259; [2001] 1 CLJ 381, the Federal Court pronounced that *a conviction will be upheld despite a misdirection if the court is satisfied that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction.* This decision was followed in *Public Prosecutor v Abdul Manaf Muhamad Hassan*. In that case, the Federal Court said that *the Court of*

Appeal should have applied the proviso to s 60 of the Courts of Judicature Act 1964 *to affirm the conviction despite the misdirection by the High Court as there was overwhelming evidence.*

In *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800, the Federal Court speaking through Zulkefli Makinudin FCJ said that *the appellate court has the power to review or to re-evaluate all the evidence available as adduced by the prosecution.* And in the Court of Appeal case of *Mohd Jamail bin Abdul Ghani v Public Prosecutor* [2013] MLJU 1604; [2013] 1 LNS 381, the alleged misdirection on the part of the trial judge was somewhat similar to the instant case. It was submitted that the trial judge erred in stating the defence was belatedly disclosed at the defence stage. The Court of Appeal held that *even if there was a misdirection by the learned trial judge at the conclusion of the defence case, the proviso to s 60(1) of the CJA should be applied as there was no miscarriage of justice and the conviction of the accused was safe*.

[51] Whilst on the topic of misdirection, and although the issue was not raised, it is imperative for us to point out that in para [24] of the grounds of judgment, the judge mentioned that exh P41A (the jeans) were worn by the appellant when he was apprehended in Kelantan. That is quite incorrect. The said exh P41A was in fact recovered at a dumpsite on 23 February 2016, which was well after the appellant was apprehended in Kelantan and brought back to Selangor. The judge's (erroneous) observation as to exh P41A reads as,

> [24] ... SP13 juga telah menemukan satu profil DNA lelaki telah diperolehi daripada kesan darah pada *seluar jeans [P41(A)] yang dijumpai daripada milikan tertuduh semasa ditahan di negeri Kelantan* dan berpadanan dengan profil DNA yang diperolehi daripada specimen darah tertuduh.

[52] Be that as it may, the question before us, is whether in light of the misdirection, the conviction is safe? In order to answer that question, it is necessary to ask — if a reasonable tribunal had properly apprised itself of all the available evidence, including but not limited to the fact that the appellant's DNA was not found on exh P31A, and the fact that Mya Hlaing's (alleged) involvement in the murder, was brought up during cross-examination, particularly during the evidence of SP6 and SP11, would the tribunal have convicted the appellant?

[53] The starting point in our analysis is s 300 of the Penal Code which defines the offence of murder. It states:

> Except in the cases hereinafter excepted, culpable homicide is murder —
>
> (a) if the act by which the death is caused is done with the intention of causing death;

(b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(c) *if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death*; or

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid. (Emphasis added.)

[54] The judge opined that exh P31A was the murder weapon and that having due regard to the nature and extent of the horrific injuries which had been inflicted upon the deceased, it was appropriate that injuries were sufficient in the ordinary course of nature to cause death. Indeed, based on SP5's evidence, the deceased had little to no chance of survival. There is no doubt in our mind that the injuries, particularly the severe injury to the right carotid artery, the right jugular vein, and the trachea (which was cut), were of such gravity and severity that death was inevitable. In our view, the judge's conclusion that by inflicting these horrific injuries, the perpetrator had committed murder is quite unimpeachable. The sole question is whether it was the appellant who inflicted these injuries on the deceased and thereby committed the offence of murder.

[55] As mentioned earlier, the prosecution's main witness was SP6. He was a co-worker. He was known the deceased and the appellant. Thus, when SP6 said that he saw the appellant, it means that he 'recognised' the appellant. The evidence of SP6 was that he recognised the appellant as the person who was seen coming out the deceased's room and holding exh P31A, with blood on his (striped) T-shirt. He was shown exhs P30A and P31A. He said that exh P30A was not the knife which was held by the appellant. He was then shown exh P31A, and he confirmed that this was the knife which the appellant was seen holding as he came out the deceased's room on 16 February 2016. SP6 was cross-examined by counsel for the appellant. It was suggested that the corridor was dark and that he could not have seen the appellant. He disagreed. He stood his ground. He said he saw the appellant coming out of the deceased's room and he was holding a knife with a 6-inch blade and had a black handle. He just could not remember whether he held the knife in his right hand or left hand.

[56] The appellant agreed during cross-examination that he had no misunderstandings with SP6. There was no suggestion that SP6 had any motivation or reason to lie, or to fabricate evidence against the appellant. As mentioned in the early part of this judgment, the rooms are located next to each other and separated by a narrow corridor. Of course, it was put to SP6 during

A cross-examination that it was Mya Hlaing who committed the offence. To this, SP6 said he had no knowledge. All that he could say was that he heard a scream, and he went out of his room, and he saw the appellant coming out of the deceased's room and was holding exh P31A. He saw that there was some blood on the appellant's T-Shirt. He said that the appellant did not say anything to
B him, and that the appellant quickly ran down the stairs.

[57] SP6 was scared when he saw the deceased lying motionless in the room and covered in blood. He said that he called his employer, SP3 and told him
C that the appellant had killed the deceased. Having perused the notes of evidence, we noted that SP6 was not cross-examined on this aspect of his evidence. Further, when SP3 testified, he did not say that SP6 had called him and said that the appellant had killed the deceased. SP3 said something else. He said that he was asleep and he received a call from his sister, Yap Lay Keng at
D around 10am and she told him that a female worker had died in the hostel and that the appellant had killed the worker named, Ching Huai Vung. Ms. Yap Lay Keng did not testify. There was no objection to this evidence, which was hearsay.

E **[58]** On this note we should mention that another piece of hearsay evidence was introduced when SP4 testified. SP4 (Yap Tian Seng) was the cashier. He was on night shift that day. At around 10am SP4 was asleep when he received a call from his mother, Mdm Chai Ah Mui who told him that 'pekerja ada potong orang'. He explained that his mother told him that 'That Wei yang
F potong orang'. SP4's mother did not testify. There was no objection and no cross-examination of SP4. Clearly, SP4's evidence as to what his mother had told him was hearsay and was inadmissible. But from the grounds of judgment, it does not appear that the judge paid any attention to this aspect of the prosecution's case. In our view, rightly so.

G

[59] At any rate, the evidence by SP3 and SP4 as to what their sister and mother said respectively do not establish the truth as to whether the appellant had committed murder. The evidence only establishes that SP3 and SP4 were informed by persons who were not themselves called as witnesses, that the
H appellant had killed the deceased. As such, no weight can be attached to this part of SP3's and SP4's evidence.

[60] But, going back to SP6's evidence. He said that he called SP3 and told him that the appellant had killed the deceased. SP6 was not cross-examined on
I this. What this means is that SP6's evidence that he called SP3 and informed him of the incident, was unchallenged. It is just that SP3 did not himself say that he received a call from SP6 whereby he was informed that the appellant had killed the deceased. The significance of SP6's call to SP3 is this — it shows SP6's contemporaneous impulsive conduct in reporting the incident to his

employer. SP6's evidence has a ring of truth about his version that he saw the appellant coming out of the deceased's room whilst holding exh P31A and with his striped T-shirt smeared with blood. The evidence by SP6 therefore placed the appellant at the scene of the incident and he was seen holding the murder weapon (exh P31A). He was seen running away from the scene thereafter.

[61] Of course, the appellant's blood-stained striped T-Shirt was not recovered. What was recovered was a white (Levis Strauss) T-shirt (exh P32B), but SP13 (the chemist) did not detect any blood stains on it and could not find any trace of DNA on the said exhibit. It is apparent that exh P32B is not the apparel which was worn by the appellant on 16 February 2016.

[62] We may now deal with the pair (Lee) jeans (size 28) (exh P41A) which was recovered from a dumpsite. As mentioned earlier, the appellant led the police team which was headed by SP10 to the dump site, where the jeans (with belt) was recovered. During cross-examination of SP10, it was suggested that the appellant was not conversant in Bahasa Melayu and that he could not have given proper information to the police such as to lead the police to the dump site. SP10 seemed to agree that the appellant was not conversant in Bahasa Melayu.

[63] But according to SP10's police report, exh P41A was recovered as the 'penama telah menunjukkan sehelai seluar warna kelabu dengan tali pinggang warna merah hati yang dibuang di tempat pembuangan sampah'. The process by which SP10 had recovered exh P41A was not challenged in the appeal before us. Thus, we have to take it that exh P41A (the jeans) was recovered upon information having been given by the appellant to SP10.

[64] We also note that during examination-in-chief, the appellant said nothing about any misinformation or miscommunication between him and SP10 vis a vis the information that he had given which led to the recovery of the jeans from the dumpsite.

[65] Of course, the significance of the jeans is that it belonged to the appellant and was recovered from the dumpsite. The jeans had traces of blood and SP13 testified that the blood stains yielded the deceased's DNA. SP13 also found the appellant's DNA on the jeans (exh P41A). What this means is that the appellant's jeans had come into contact with the deceased's blood. When we posed the question as to how the deceased's blood could have come into contact with the appellant's jeans, counsel offered the explanation that the appellant had testified that he 'bumped' into Mya Hlaing and that the deceased's blood could have 'transferred' to the jeans which were worn by the appellant.

[66] But it is to be noted that during the prosecution's case, SP13 had clearly

stated that the deceased's blood (DNA) was found on exh P41A. And during the defence stage, the appellant offered no explanation for the presence of the deceased's blood on his jeans. In fact, his evidence was that there was *no blood* on his attire.

[67] This is what the appellant said:

> S: Semasa awak memanggil Mya Hlaing semasa awak tarik dia keluar, adakah awak nampak dia memegang apa-apa?
>
> J: Saya nampak di tangan dia pisau dan di tubuh dia berdarah.
>
> S: Apa yang terjadi kepada pisau itu kamu tahu?
>
> J: Saya tak tahu.
>
> S: *Adakah apa-apa darah terkena pada baju kamu atau seluar kamu*?
>
> J: *Tiada*. (Emphasis added.)

[68] The appellant's version of events was that he knew Mya Hlaing was going to see the deceased over a debt which she owed to Mya Hlaing. He heard a loud sound, and he ran upstairs. His evidence was as follows:

> S: Bila kamu sampai ke tempat kamu dengar jeritan itu di tingkat 3, apa kamu lihat?
>
> J: Saya jumpa dengan seorang lelaki bernama Mya Hlaing.
>
> S: Setelah kamu jumpa dia apa dia sedang buat?
>
> J: Saya nampak pada badan dia berlumuran darah.
>
> S: Lepas itu?
>
> J: Saya tarik dia daripada tepi, tolak keluar ...
>
> Mah: Tolak keluar dia dari mana?
>
> J: Saya tolak ke kawasan tangga yang turun ke bawah.
>
> S: Lepas itu?
>
> J: Saya tarik dia daripada tepi, tolak keluar ...
>
> Mah: Tolak keluar dia dari mana?
>
> J: Saya tolak ke kawasan tangga yang turun ke bawah.
>
> S: Adakah kamu nampak apa-apa lagi di situ?
>
> J: Selepas tolak, saya pergi ke bilik perempuan itu dan bertanyakan kepada perempuan itu yang baring di tepi pintu bilik dia.
>
> ...
>
> S: Adakah kamu tanya Mya Hlaing kenapa badan dia berlumuran darah?
>
> J: Saya tak soal dia apa-apa. Saya panggil dia keluar saja.

[69] The appellant said that he did not inform the police about what he had seen. His evidence was as follows:

> S: Awak telah nampak kejadian seorang perempuan berlumuran darah, seorang lelaki berlumuran darah lari dari tempat itu, mengapa awak tidak buat laporan polis atau beritahu polis mengenai kejadian itu?
>
> J: Saya takut saya akan ditangkap.

[70] According to the appellant, after he was arrested, he did inform the police about Mya Hlaing. He said:

> S: Adakah semasa di Balai Subang, ada kamu beritahu mengenai individu bernama Mya Hlaing?
>
> J: Saya ada bagitau tapi mereka tak faham. Saya tak pandai Bahasa Melayu. Saya suruh mereka panggil kedutaan Myanmar. Apabila saya suruh mereka memanggil Embassy, mereka memukul saya.

[71] Hence, ultimately what we are left with is the appellant's evidence where he said that he did not commit the murder, and that the person responsible was Mya Hlaing. The appellant claimed that he fled because he got scared and panicked. He was worried that he might be implicated in the murder. He said he never held the murder weapon. He said that Mya Hlaing held the knife. He did not know what happened to the knife after he pushed Mya Hlaing away.

[72] In cross-examination, the appellant said that if he held the knife then his fingerprints should be on it. But we know from the scientific evidence that the knife (exh P31A) had a rough surface, and they could not lift any fingerprint from the handle of the knife. The appellant also said that he did not see SP6 that morning.

[73] In this case, the prosecution did not lead any evidence pertaining to motive for the murder. But whilst motive is relevant, the absence of motive is not fatal to the prosecution's case. However, where the prosecution is relying on circumstantial evidence, motive may help to tilt the evidence in favour of guilt of the accused person.

[74] Counsel said that the judge did not deal with the infirmities in SP6's evidence. He said that SP6's evidence had gaps and was not substantiated. We noted that in the grounds of judgment, the judge did not specifically deal with the credibility of SP6. Of course, it is settled law that the assessment of credibility of a witness is the domain of the trial judge. Unless, the judge has seriously misdirected himself, an appellate court should be slow to interfere with the judgment of the trial court that had audio visual advantage. The judge

did summarise SP6's evidence in the following words:

> [22] ... Namun, mahkamah ini telah meneliti dan membuat keputusan untuk menerima keterangan mengikut keadaan 'circumstansial evidence' yang diberikan oleh SP6 bagi mengaitkan tertuduh dengan kematian si mati.
>
> [23] Berdasarkan keterangan SP6 menyatakan bahawa telah melihat tertuduh telah keluar dari dalam bilik si mati sambil memegang pisau berhulu plastik warna hitam [P31(A)] dan juga melihat baju T berjalur warna putih yang dipakai oleh tertuduh mempunyai kesan darah di bahagian hadapan baju T tersebut. Tambah SP6 lagi, dia melihat tertuduh telah turun melalui tangga dengan keadaan yang bergesa-gesa kearah tingkat bawah setelah keluar dari dalam bilik si mati tersebut.

[75] In this case, the judge drew an inference of guilt against the appellant based on, inter alia, his conduct in fleeing the scene and heading towards the Malaysian border in Kelantan.

[76] The judge also opined that if he had nothing to do with the crime, then the appellant, if he was innocent, would have informed his co-workers, or his employer, SP3 as to what had happened. The judge took note of the fact that the appellant did not lodge a police report to what he had (allegedly) seen, ie, the Mya Hlaing theory.

[77] The judge examined the appellant's evidence as to what he did that day after leaving the hostel to be quite inconsistent with his version as to what had (allegedly) happened. For instance, the judge found it odd, that the appellant, who claimed to be intoxicated, after the drinking session with Mya Hlaing was sober enough to go to Hero supermarket to purchase a mobile phone charger. And when he had allegedly witnessed the incident involving Mya Hlaing, he was sober enough to push Mya Hlaing and pack some clothes and head towards the location of TESCO. He said he met up with Hla Shawe ('the agent') who made the arrangement for him to travel to Kelantan. He said that he slept in Hla Shawe's place that night. But he did not utter a word about the so-called incident involving Mya Hlaing, to Hla Shawe.

[78] Specifically on the conduct of the appellant in fleeing the hostel and heading towards the Malaysian border, counsel for the appellant said that such conduct of itself is not indicative of guilt. He said that the appellant got scared and panicked. And he decided to leave the country. Counsel said that the judge was wrong to draw a sinister inference from the appellant's act of fleeing the scene. Counsel said that panic and fear are normal human responses to such situations and that the judge should have made room for the probability that the appellant acted instinctively when he fled the scene.

[79] Counsel sought to bolster his argument by referring to the Court of

Appeal's decision in *Lim Hean Cheong v Public Prosecutor* [2012] 1 MLJ 149; [2012] 2 CLJ 1046; [2011] 1 LNS 1078; [2012] 1 AMR 160 (CA) which was also a case involving the offence of murder under s 302 of the Penal Code. In that case, the deceased operated a business dealing with antiquated items such as old coins, stamps and other artefacts. The business was carried out in the name and style of Leong Stamps Co in a premise at No 65–A, Jalan Masjid Kapitan Keling, Penang ('the said premise'). There was a collapsible grill at the entrance of the said premise. The upper floor of the said premise was utilised as an accommodation for the deceased and his sister, PW4. On 24 April 2006 when PW4 returned to the said premise from work at around 3.30 pm she found the collapsible grill locked. She also saw the appellant seated on a chair in the business area of the said premise. The appellant was seen scrapping a drawer of a particular table with a screwdriver. PW4 screamed at the appellant and questioned him on the whereabouts of her brother, the deceased. The appellant, 'appeared pale and perspiring', told PW4 that the deceased was in the lavatory and it was the deceased who had asked him to sit by that table. PW4 demanded the appellant to open the grill and directed him to handover to her the bunch of keys. The appellant handed her the keys. PW4 unlocked the grill and immediately rushed to the back of the said premise where the kitchen and lavatory were located. There she found her brother's bloodied body, with both his hands and legs bound with adhesive or duct tape while the head was covered with a T-shirt. The body was facing downwards. There was a wooden stool placed over his head and a gas cylinder on top of the stool. The appellant *fled the scene on a motorcycle*. He was *arrested* on 29 May 2006, *more than a month after the alleged incident*.

[80] The appellant was charged with the offence of murder s 302 of the Penal Code. In his defence the appellant, a regular customer of the deceased, testified that he was present at the premises to question the deceased about the questionable quality of three old coins that the deceased had sold to him the day before. According to the appellant, when he entered the premises, he had spontaneously closed the grill, which had automatically locked itself, and that he had then found the deceased lying bound and motionless. He also testified that he encountered the deceased's sister while he was looking for the keys to unlock the grill and after unlocking the same, *he had fled the scene in panic and fear*. The trial judge was satisfied that a prima facie case had been proved by the prosecution against the appellant and that the appellant's defence, which was a mere denial failed to raise a reasonable doubt on the prosecution's case. The appellant was convicted for murder. The appellant submitted that the trial judge had misdirected himself in failing to consider the entire evidence in its totality and thereby failing to realise the numerous gaps in the prosecution's case. The appellant submitted that the trial judge had failed to consider the absence of blood stains on the white shirt worn by the appellant; the absence of any fingerprints or DNA evidence connecting him to the crime; the absence of any motive for the killing; and the possible involvement of a third person in the

death of the deceased. The appeal was allowed and the appellant was acquitted. The Court of Appeal in *Lim Hean Cheong* held that:

> [55] One of the main evidence adduced by the prosecution against the appellant was that he was inside the said premise shortly before the body of the deceased was discovered by PW4 and the appellant, *after unlocking the grill of the said premise from inside, left the scene immediately*.
>
> [56] With regard to these evidence *we are of the view that no adverse inference of guilt could be drawn against the appellant from the fact that he was present in the vicinity of the crime and his immediate disappearance from the scene.*
>
> The appellant had explained that he went to see the deceased on that day to enquire about the coins he bought from the deceased the day before. He explained what had happened to the grill when he was inside the said premise. More importantly, there was no direct evidence *He also explained that he took flight from the scene of the crime after the grill was unlocked because he was in a state of panic and fear.*
>
> *An innocent man faced with such situation might foolishly react in that way. More importantly, there was not direct evidence to* link the appellant to the killing that took place in the said premise. (Emphasis added.)

[81] In the present case, the conduct of the appellant in running away from the scene and attempting to flee the country through the border in Kelantan, brings into play ss 8 and 9 of the Evidence Act 1950. These statutory provisions are reproduced below:

> 8 Motive, preparation and previous or subsequent conduct —
>
> (1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.
>
> (2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.
>
> Explanation 1 — The word 'conduct' in this section does not include statements unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.
>
> Explanation 2 — When the conduct of any person is relevant any statement made to him or in his presence and hearing which affects his conduct is relevant.
>
> ILLUSTRATIONS
>
> (a) is tried for the murder of B.
>
> The facts that A murdered C, that B knew that A had murdered C and that B had

tried to extort money from A by threatening to make his knowledge public are relevant.

(b) A sues B upon a bond for the payment of money. B denies the making of the bond.

The fact that at the time when the bond was alleged to be made B required money for a particular purpose is relevant.

(c) is tried for the murder of B by poison.

The fact that before the death of B, A procured poison similar to that which was administered to B is relevant.

(d) The question is whether a certain document is the will of A.

The facts that not long before the date of the alleged will A made inquiry into matters to which the provisions of the alleged will relate, that he consulted lawyers in reference to making the will and that he caused drafts of other wills to be prepared of which he did not approve are relevant.

(e) is accused of a crime.

The facts that either before or at the time of or after the alleged crime A provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence or prevented the presence or procured the absence of persons who might have been witnesses or suborned persons to give false evidence respecting it are relevant.

(f) The question is whether A robbed B.

The facts that after B was robbed, C said in A's presence: 'The police are coming to look for the man who robbed B' and that immediately afterwards A ran away are relevant.

(g) The question is whether A owes B RM10,000.

The facts that A asked C to lend him money, and that D said to C in A's presence and hearing: 'I advise you not to trust A for he owes B RM10,000,' and that A went away without making any answer are relevant facts.

(h) The question is whether A committed a crime.

The fact that A absconded after receiving a letter warning him that inquiry was being made for the criminal and the contents of the letter are relevant.

(i) is accused of a crime.

The facts that after the commission of the alleged crime he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it are relevant.

(j) The question is whether A was ravished.

The facts that shortly after the alleged rape she made a complaint relating to the

crime, the circumstances under which and the terms in which the complaint was made are relevant.

The fact that without making a complaint she said that she had been ravished is not relevant as conduct under this section, though it may be relevant —

(i) as a dying declaration under section 32(1)(a); or

(ii) as corroborative evidence under section 157.

(k) The question is whether A was robbed.

The fact that soon after the alleged robbery he made a complaint relating to the offence, the circumstances under which and the terms in which the complaint was made are relevant.

The fact that he said he had been robbed without making any complaint is not relevant as conduct under this section, though it may be relevant —

(i) as a dying declaration under section 32(1)(a); or

(ii) as corroborative evidence under section 157.

9 Facts necessary to explain or introduce relevant facts

Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened or which show the relation of parties by whom any such fact was transacted, are relevant so far as they are necessary for that purpose.

ILLUSTRATIONS

(a) The question is whether a given document is the will of A.

(b) A sues B for a libel imputing disgraceful conduct to A; B affirms that the matter alleged to be libellous is true.

The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue.

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between A and B.

(c) is accused of a crime.

The fact that soon after the commission of the crime A absconded from his house is relevant under section 8 as conduct subsequent to and affected by facts in issue.

The fact that at the time when he left home he had sudden and urgent business at the place to which he went is relevant as tending to explain the fact that he left home suddenly.

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.

[82] The principles relating to the application of ss 8 and 9 of the Evidence Act 1950 were comprehensively considered and elucidated by the Federal Court in *Parlan Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2008] 1 LNS 506; [2009] 1 CLJ 717 (FC) ('*Parlan*'s case') per Augustine Paul FCJ:

> [28] Evidence of conduct is admissible under s 8 of the Evidence Act 1950 ('s 8') which reads as follows:
>
> (1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.
>
> (2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.
>
> [29] Illustration (i) to s 8 reads as follows:
>
> A is accused of a crime.
>
> The facts that after the commission of the alleged crime he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it are relevant.
>
> [30] In commenting on the admissibility of evidence of conduct under s 8 Sarkar on Evidence 15th edn says at p 175:
>
> The conduct of party to a proceeding or his agent in reference to such proceeding at the time when the facts occurred out of which the proceeding arises, or in reference to any fact in issue or relevant fact, or the conduct of the complainant, is relevant; but the condition precedent to its admissibility as 'conduct' is that it must directly influence or be influenced by a fact in issue or relevant fact and such conduct does not include action resulting from other causes or circumstances. It must be the essential complement of the act done or refused to be done. Conduct includes antecedent or subsequent conduct involving both actions and statements.
>
> And at p 194:
>
> What is meant by the words, if such conduct influences or is influenced by any fact in issue or relevant fact, is that there must be a direct or immediate relation between the conduct and the fact in issue. Conduct which is brought about by some other agency though connected with the facts in issue is not relevant conduct.
>
> [31] The effect of evidence that complies with the requirements of s. 8 and when it does not can be seen in the case of *Kuldip Sharma v The State* [1996] Cri LJ 244 where JB Goel J said at pp 250–251:
>
> The occurrence had taken place sometime during night of 1st or 2nd 1985. The

A accused was found absent from his house next morning. He was absconding after the occurrence. Learned counsel for the appellant has contended that the mere fact of absconding or having been last seen together, is not incriminating circumstance justifying conviction. For this, he has relied on *State of Rajasthan v Smt Kamala* AIR [1991] SC 967, *Inderjit Singh v State of Punjab* AIR [1991] SC
B 1674, *Satish Kumar v State* [1994] (IV) CCR 2579 (DB) (Bombay) and *Lakhanpal v State of Madhya Pradesh* [1979] Cr LJ 1217 (SC).

In these cases, except the evidence of last seen together or absconding, no other circumstantial evidence was proved or found reliable and trustworthy to form a chain of circumstances complete enough to base conviction.

C

The conduct of the accused soon after the incident plays an important part in the determination of the guilt and is a corroborative piece of evidence. Disappearance of the accused after the occurrence is a relevant circumstance which in the absence of any plausible explanation, could be taken into consideration against him as conduct under Section 8 of the Indian Evidence Act. In the present case, firstly, there is no material on
D the record to show why the deceased would have committed suicide. The accused was present at the time of the concurrence and if it was a case of suicide, there is no material brought on the record to show that the accused had taken any steps either to prevent her from so doing or get her medical aid immediately. As a normal human conduct on the death of a near kith and kin, one laments and would raise
E hue and cry and even take assistance and counsel from the neighbours and the accused had cordial relations with his immediate neighbours. Instead of doing so, he had slipped away and remained absconding for several days. This conduct certainly destroys presumption of innocence on his part.

[32] Evidence of conduct admissible under s 8 may be explained as provided in s 9
F of the Evidence Act 1950 ('s 9') which reads as follows:

> Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened or which
G show the relation of parties by whom any such fact was transacted, are relevant so far as they are necessary for that purpose.

[33] Illustration (c) to s 9 reads as follows: A is accused of a crime.

> The fact that soon after the commission of the crime A absconded from his house
H is relevant under section 8 as conduct subsequent to and affected by facts in issue.
>
> The fact that at the time when he left home he had sudden and urgent business at the place to which he went is relevant as tending to explain the fact that he left home suddenly.
>
> The details of the business on which he left are not relevant, except in so far as
I they are necessary to show that the business was sudden and urgent.

[34] In commenting on s 9 Sarkar on Evidence 15th edn says at p 204:

> S 9 deals with facts necessary to explain or introduce relevant facts. Such facts are not of a causative nature, nor can they be strictly said to form part of the same

> transaction. Facts which explain or introduce a fact in issue though relevant for the purpose stated in the section, such facts do not form part of the res gestae (ante, s 6) as they do not accompany the facts or transaction in issue. Facts which are explanatory or introductory of a relevant fact are often of considerable help in understanding the real nature of a transaction, in supplying missing links, in leading up to the main fact, or in establishing some connexion throwing light on the fact in issue.

[35] The applicability of the two sections was considered in *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649 where the High Court said at pp 721–722:

I must add that evidence of conduct which allows inferences to be drawn, as in the two cases referred to, is admissible under s 8 of the Evidence Act 1950. *A typical example of such conduct is the absconding or flight of a person after the commission of an offence. But evidence of mere absconding or flight is not such a vital circumstance which can be considered to show that the absconder was having any guilty mind (see Bhagat Bahadur v. State* [1996] Cri LJ 2201). Such conduct must be considered in the totality of the evidence adduced (see *Mansor bin Mohd Rashid's* case).

For it to be capable of amounting to an admission of guilt there must be a nexus between his conduct, his flight and the offence in question. As Lord Ackner said in *Chan Kwok Keung & Anor v The Queen* [1990] 3 CLJ 386 (Rep); [1990] 1 CLJ 411 at p 413:

> It is common ground that conduct, and in particular the flight of an accused after an offence has been committed, may be tantamount to an admission by him of his guilt of that offence and as such admissible evidence. Their Lordships' attention was invited by Mr Duckett QC on behalf of the crown to a number of Australian authorities which illustrate this proposition. But each case must depend on its own particular facts. In those cases to which their Lordships were referred, the flight of the accused had occurred within a short space of time of the offence being committed and in circumstances which clearly connected the accused with the offence.

In this case the appellants were found stowed away nearly ten months after the commission of the crime. The prosecution led no evidence to suggest that they had been in hiding for all or any part of this period. Indeed there was no evidence as to whether any and if so what efforts had been made by the police to find them and with what result.

Leung, in his statement to the police after his arrest, gave them some information as to where the appellants were living or working, but no evidence was given as to whether these leads were followed up and if so with what result.

It would in their Lordships' opinion be quite wrong for the jury to have taken it for granted that the appellants, during all or any part of this relatively lengthy period, had been evading capture for this offence. That was not the case as presented by the prosecution, and very appropriately the judge in his summing-up never suggested to the jury that they were entitled to make such an assumption.

In order for flight to be capable of amounting to an admission of guilt there must be some evidence which establishes a nexus between the conduct of the accused, his

flight or concealment and the offence in question. In this case the prosecution produced no evidence to establish that either of the appellants had been hiding away or otherwise behaving in an unusual manner in this period of nearly ten months. There was therefore no material which could have justified the jury inferring that the only reasonable explanation for the appellants stowing away on the ship from Hong Kong to Macau was that they were on the run, because they knew they might be arrested and charged with this murder. There could have been a variety of other reasons for their having stowed away nearly ten months after the murder.

Evidence of such conduct can be explained away by the accused as provided by s 9 of the Evidence Act 1950 (see *Ling Ngan Liong v Public Prosecutor* [1964] MLJ 20; *Choo Chang Teik & Anor v Public Prosecutor* [1991] 3 MLJ 423; [1991] 1 CLJ 54 Rep; [1991] 3 CLJ 2387). *However, the onus is on the accused to explain his conduct.* Thus in *Mansor bin Mohd Rashid 's* case, the Federal Court held that the intention of the accused persons to flee, when considered in the light of the evidence adduced, justifiably necessitated some explanation from them. A failure to put forward any explanation of absconding after the occurrence of a crime is a point in favour of the prosecution (see *Parmeshwar v R* AIR [1941] Orissa 517).

[36] The law relating to evidence of conduct is thus patent. If there is no evidence to show that the conduct is influenced by any fact in issue or relevant fact as required by s 8 then it is not admissible as it would then be an equivocal act justifying inferences favourable to the accused being drawn. If it satisfies the requirement of s 8 it is admissible. It must be observed that the degree of proof required to establish evidence of conduct would depend on the nature of the conduct. *Conduct like the flight of an accused is a more positive act and is easily established*. On the other hand conduct like the accused looking stunned, nervous, scared or frightened is very often a matter of perception and more detailed evidence may be required. Once admitted the court cannot resort to any other explanation for the conduct or draw inferences on its own accord to render it inadmissible.

The onus is on the accused to explain his conduct pursuant to s 9. *Such explanation must not be in their barest possible form, but with a reasonable fullness of detail and circumstance* (see *R v Stephenson* [1904] 68 JP 524). The onus may be discharged even in the course of the case for the prosecution, for example, by way of cross-examination of relevant witnesses. If not so done it can be discharged only at the defence stage. However, the evidence admissible under the section must be confined to what is necessary for the purposes enumerated. Illustration (c) to s 9 explains the operation of this principle. It provides that when A is accused of a crime the fact that soon after the commission of the crime he absconded from his house is relevant. But the fact that at the time when he left home he had sudden and urgent business at the place to which he went, is relevant, as tending to explain the fact that he left home suddenly. The details of the business on which he left, however, are not relevant, except in so far as they are necessary to show that the business was sudden and urgent. If the explanation is accepted by the court then the inference arising from the conduct is rebutted. If it is not accepted or if the accused does not explain his conduct the inference remains unrebutted.

[37] It is now appropriate to consider the rationale of the court in explaining the conduct of the accused in running away in *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1; [1993] 4 CLJ 1 which formed the basis of the

submission of the appellant. In that case the drugs were found in a house occupied by the accused, his wife and a third person. The court considered the evidence of possible access to the house by others, and in distinguishing the case from *DPP v. Brooks* [1974] 2 All ER 840, held that *the conduct of the accused in running away was equally consistent with him having been in a state of pure panic even though he did not offer any explanation himself.* On the other hand in *DPP v Brooks* [1974] 2 All ER 840 the accused was in the driver's seat of a stationary van with several others. There were drugs in the van. When the police approached the van all of them ran. The conduct of the accused in running away was held against him. The difference in both the cases is that in *Abdullah Zawawi Yusoff v Public Prosecutor* [1993] 3 MLJ 1; [1993] 4 CLJ 1 there was no evidence to show that the act of the accused in running away was influenced by any fact in issue or relevant fact within the meaning of s 8 in view of the possibility of access to the house by others. It is therefore not admissible on this ground as it is equivocal thereby justifying an inference in favour of the accused being drawn and ought to have been so ruled at an earlier stage of the trial.

The case of *Abdullah Zawawi Yusoff v Public Prosecutor* [1993] 3 MLJ 1; [1993] 4 CLJ 1 is therefore authority only to this extent. On the other hand in *DPP v Brooks* [1974] 2 All ER 840 there was evidence to show that the drugs were in the physical custody and control of the accused and his conduct of running away thus comes, in the Malaysian context, within the meaning of s 8.

It is therefore admissible and cannot be explained away by the court itself by offering an explanation which is consistent with the innocence of the accused. The explanation must be offered by the accused himself as required by s 9 (Emphasis added.)

[83] The appellant also did not report the incident to his employer, SP3, his co-workers, or even to Hla Shawee who is said to have arranged for his trip to Myanmar through the border in the State of Kelantan. There are many judicial pronouncements in relation to the type of conduct which may attract the inference under s 8 of the Evidence Act 1950 (see: *Parlan*'s case). But, we find the following passage from the case of *Kuldip Sharma v The State* [1996] Cri LJ 244 to be particularly relevant. In that case, Justice JB Goel said:

The conduct of the accused soon after the incident plays an important part in the determination of the guilt and is a corroborative piece of evidence. Disappearance of the accused after the occurrence is a relevant circumstance which in the absence of any plausible explanation, could be taken into consideration against him as conduct under Section 8 of the Indian Evidence Act.

[84] And it is trite that conduct of the type contemplated by s 8 of the Evidence Act 1950, which incriminates an accused person, must be explained as per s 9 of the Evidence Act 1950. The question is whether the appellant's conduct can be said to be an indication of his guilt or whether he has sufficiently explained his conduct, such that his conduct is to be regarded as benign.

[85] We have examined the evidence in totality and considered the judge's grounds of judgment and submissions of the parties to this appeal.

[86] Ultimately, we are impelled to the conclusion that the appellant has not raised any reasonable doubt in relation to his culpability in the murder of the deceased on 16 February 2016 (see Sharma J in *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16; [1971] 1 LNS 115 (HC)).

[87] We find that the circumstantial evidence when taken together with all the evidence adduced by the prosecution and defence leads to the irresistible conclusion that the appellant had inflicted the fatal injuries on the deceased. It is also clear from the nature of the injuries, particularly the incision wound to the neck that the appellant must have intended to inflict such bodily injury on the deceased which was sufficient in the ordinary course of nature to cause death. Thus, the appellant's act fell squarely within limb (c) of s 300 of the Penal Code.

[88] Having re-evaluated the evidence, and having considered the submissions of counsel, we are of the unanimous view that even after having disregarded the erroneous evidence as to the appellants' DNA being found on exh P31A and accepting the fact the (alleged) involvement of Mya Hlaing was brought up especially during the cross-examination of SP6 and P11, we find that the remaining strands of evidence have sufficient strength of probity to form a case against the appellant that is strong enough to meet the stringent requirements of the law to convict a person based on circumstantial evidence. See: the pronouncement by the Court of Appeal in *Chan Chwen Kong v Public Prosecutor* [1962] 1 LNS 22; [1962] MLJ 307 (CA), which was reiterated by the Federal Court in *Pathmanabhan Nalliannen v Public Prosecutor & other appeals* [2017] 3 MLJ 141; [2017] 4 CLJ 137; [2017] 3 AMR 105; [2017] AMEJ 371 (FC). See also: *Ahmad Najib Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800 (FC).

[89] It is our finding that despite the misdirection on parts of the evidence as alluded to above, the fact remains that SP6's evidence is that he heard a scream and he quickly went out of his room and he saw the appellant coming out of the deceased's room and was holding exh P31A. The appellant was wearing a striped T-shirt which had some bloodstain on it. But that T-shirt was not recovered. The appellant was seen running down the stairs. The knife (exh P31A) was recovered near the staircase. It had blood stains on it, and it was determined that the deceased's DNA was on the knife. Looking at the horrific injuries which had been inflicted upon the deceased, the assailant had intended to kill the deceased. Here, SP6 said that he saw the appellant. The appellant said that he was at the scene, but he did not see SP6. He said he saw Mya Hlaing. He said that he pushed Mya Hlaing away. The appellant then ran away.

He met Hla Shawe who arranged his trip to Myanmar via the border in Kelantan. He stayed in Hla Shawe's house that night and left for Kelantan the next day. He did not mention anything about the incident or about Mya Hlaing to Hla Shawe. He did not mention anything to his employer, SP3. The appellant claimed that he told the police about Mya Hlaing and that he was assaulted when he asked for a Myanmar translator. But it is significant to note that the issue of the appellant asking for a Myanmar translator or that he had mentioned the existence or the involvement of Mya Hlaing in the murder was not at all put to SP11. We also note that the cautioned statement (s 113 of the Criminal Procedure Code) was not tendered. We mention that only for purposes for completeness. We do not draw any adverse inference from the non-production of the cautioned statement.

[90] All that we can say is that there is no evidence that the appellant had informed the police about the existence of or the involvement of Mya Hlaing. Indeed, if such a person did exist, then at the very least, there should be some paper trail to show that he did work in the vicinity of the restaurant.

[91] But there appeared to be no effort made to elicit facts to at least show that Mya Hlaing existed, and that he was involved in the murder of the deceased. As the judge correctly concluded, the appellant was lawfully working in Malaysia. He had no reason to be afraid of the authorities. His conduct, as described above is not consistent with that of a person who was innocent. We agree, that running away from the scene of the crime per se is not evidence of guilt. But such conduct does call for an explanation.

[92] Here, the injuries to the deceased, the blood stains on exh P31A (containing the deceased's DNA), SP6's evidence as to the fact that he had seen the appellant emerging from the deceased's room whilst holding a knife with a black handle (exh P31A) and with blood stains on his striped T-shirt and the appellant's entire conduct in running away and attempting to leave the country, without even calling his employer, SP3 and the retrieval of exh P41A (which was obviously thrown into the dumpsite) (containing blood stains and the deceased's DNA and the appellant's DNA), points irresistibly to the singular conclusion that the appellant had committed the murder. The appellant could not explain why he did not even call his employer, SP3 to tell him what had happened. There is no evidence that the appellant had mentioned anything about Mya Hlaing to the police. Indeed, SP11 said that there was nothing in his file about Mya Haling. This can only mean that the appellant did not inform the police about the existence of, and involvement of the elusive character named Mya Hlaing.

[93] Thus, although the judge erred in concluding that Mya Hlaing was only brought up during the defence stage (ie an afterthought), upon an

examination of the evidence in its entirety, it is clear that the Mya Hlaing theory is one which was not communicated to the police, at the earliest possible opportunity and is in our view, devoid of any credibility. The judge's misdirection is not fatal as ultimately, there was no miscarriage of justice since there was cogent, convincing and compelling circumstantial evidence to convict the appellant.

THE OUTCOME

[94] As such, based on the evidence of the prosecution and the evidence of the appellant, we are of the view that the appellant had failed to raise a reasonable doubt as to his culpability in the offence with which he was charged, *to wit*, the murder of the deceased on 16 February 2016.

[95] In the result, for the several reasons adumbrated above, we agree and concur with the judge that the circumstantial evidence tendered by the prosecution irresistibly proved beyond reasonable doubt that it was the appellant who murdered the deceased on 16 February 2016 as per the charge, and that the evidence did not point to any other explanation which may exculpate the appellant.

[96] Consequently, upon our analysis of the case as a whole, we find the conviction for the offence of murder under s 302 of the Penal Code to be safe, and we have no reason to disturb the judge's findings of fact.

[97] The appeal is therefore dismissed. The decision of the judge dated 5 July 2018 is affirmed and the conviction and sentence for the offence of murder under s 302 of the Penal Code are hereby affirmed.

Appeal dismissed.

Reported by K Selvaraju